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APPELLANT'S APPENDIX.

RELEVANT DOCKET ENTRIES.

July 28, 1954.	Information filed.
July 28, 1954.	Motion and Order for Bench Warrant, filed. Bench Warrant exit.
May 26, 1955.	Bond of defendant in $500. with cash security, filed.
June 23, 1955.	Bench Warrant returned: and filed.
Aug. 2, 1955.	Plea: Not Guilty.
Aug. 23, 1955.	Trancript of plea, filed.
Sept. 26, 1955.	Jury called and sworn.
Sept. 26, 1955.	Trial—witnesses sworn. Defendant moves for judgment of acquittal—motion denied.
Sept. 26, 1955.	Verdict: Guilty. Defendant moves for judgment of acquittal—decision reserved. Defendant moves for a new trial. Bail continued.
Oct. 3, 1955.	Defendant's motion and reasons for judgment of acquittal or for a new trial, filed.
Oct. 26, 1955.	Testimony, filed.
Oct. 31, 1955.	Modification of and additions to defendant's reasons for judgment of Acquittal or in the alternative for a new trial, filed.

Nov. 7, 1955.	Argued sur motion for judgment of acquittal or for new trial CAV.
Jan. 9, 1956.	Opinion, Grim, J., denying defendant's motion for judgment of acquittal or for a new trial, filed.
Jan. 13, 1956.	Sentence: Fine $1,000.00.
Jan. 13, 1956.	Defendant's notice of Appeal filed (1/16/56 copies to U. S. Atty. and Clerk U. S. C. Appeals).
Jan. 13, 1956.	Copy of Statement of Docket Entries to U. S. Court of Appeals filed.
Jan. 16, 1956.	Judgment and Commitment filed.

INFORMATION.

The United States Attorney charges:

That on or about the 10th day of October 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, VICTOR CALAMARO being a person liable for the payment of Special Occupational Tax imposed by Title 26 U. S. C., Section 3290, did accept wagers as defined in Title 26 U. S. C., Section 3285, without having previously paid the Special Occupational Tax imposed by Section 3290 due and owing to the United States.

In violation of Title 26 U. S. C., Section 3294 (a).

W. WILSON WHITE,
United States Attorney.

By G. CLINTON FOGWELL, JR.,
Assistant United States Attorney.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

G. CLINTON FOGWELL, JR., being duly sworn according to law, deposes and says that he is an Assistant United States Attorney in and for the Eastern District of Pennsylvania, and that the facts set forth in the foregoing Information are true and correct to the best of his knowledge, information and belief.

/s/ G. CLINTON FOGWELL, JR.
Assistant United States Attorney.

Sworn to and subscribed before me this 28th day of July, 1954.

A. S. CLARK,
Deputy Clerk, United States District Court, E. D. of Pa.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

HARRY GEGENHEIMER, being duly sworn according to law, deposes and says that he is a Special Agent, Internal Revenue Service, and that the facts set forth in the foregoing Information are true and correct to the best of his knowledge, information and belief.

(s) HARRY GEGENHEIMER

Sworn to and subscribed before me this 28th day of July, 1954.

A. S. CLARK,
Deputy Clerk, United States District Court, E. D. of Pa.

TESTIMONY.

(2)* (Jury duly empaneled and sworn.)

(Mr. Henss stated the Government's case to the jury.)

GOVERNMENT'S EVIDENCE

Mr. Henss: Officer Benzing.

JOHN BENZING, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. Where are you employed, Mr. Benzing?
A. Pardon me?
Q. Where are you employed?
A. 29th Police District, 50th and Lancaster.
Q. You are a policeman?
A. That is right.
Q. And how long have you been so employed?
A. Twelve years.
Q. Continuously?
A. Yes, sir.
Q. Have you been connected with any particular squad?
A. Yes. I worked plainclothes at this particular time.
(3) Q. Do you know the defendant in this case?
A. Yes, sir.
Q. Victor Calamaro?

* Figures in parentheses refer to page numbers of typewritten transcript.

A. Yes, sir. I do.

Q. Do you see him in court?

A. Yes. I can.

Q. Who is he?

A. The gentleman sitting there.

Mr. McBride: We concede that he has identified the defendant.

By Mr. Henss:

Q. Did you see the defendant on or about the 10th day of October, 1952?

A. Yes. I did see him.

Q. Where did you see him?

A. We saw him on the highway at 8th and Catharine Streets.

Q. And about what time of the day was it?

A. It was about 1:45 P.M.

Q. Will you state under what circumstances you saw him?

A. Accompanied with Officer Kelly, we were riding in our own private car and we observed the defendant on the highway between 7th and 8th on Catherine walking west. We approached the defendant and we questioned him if he had any number paraphernalia on him.

(4) Mr. McBride: Go ahead.

The Witness: He stated he did.

Mr. McBride: Just a minute. I first move that the "he did" be stricken. I object to any conversation had with the defendant, the corpus delicti not having been proved.

Mr. Henss: I will withdraw that question.

By Mr. Henss:

Q. Did you search the defendant?

A. We did.

Q. What did you find?

A. We confiscated from his person 40 yellow banker slips.

Mr. McBride: Now, just a minute, sir. I would like to cross-examine him as to whether or not he has the slips before he is permitted to give an opinion as to what the slips are, sir. I suppose opinion, as I take it, may be given in such cases, but the papers upon which the opinion is based must be here for the perusal of the Court and the ultimate Judge and the jury. They must be in evidence.

The Court: Go ahead.

CROSS-EXAMINATION

By Mr. McBride:

Q. Do you have anything here that you seized from him?

A. No, we do not.

Mr. McBride: Then I object to his stating an (5) opinion as to what it was he seized from the defendant.

Mr. Henss: Your Honor, I will explain the absence of the numbers slips—pardon me—of the slips in this case later. I would like to ask him to describe the slips.

Mr. McBride: Well, we object to it, sir; unless the absence of the slips is in some way attributable to the defendant himself, it is the duty of the prosecution to produce them. Neither carelessness nor even though they act with perfectly good and honest intent—if they throw away evidence or if they do not have evidence, unless it is attributable to the defendant himself, it is their duty to produce it; otherwise the defendant would be denied of his Constitutional right of confrontation, the evidence itself that is to be produced against him.

Mr. Henss: Your Honor, we are unable to produce them because of the fact that the slips were confiscated, that they were ordered destroyed, as we shall bring out by a proper witness.

Mr. McBride: Then, may it please the Court, it seems to me they can't face the defendant with his accusers or the evidence against him, and the necessary consequence, if you have to deprive him of his right or that he go free, the choice is easy—he must go free.

(6) The Court: Well, I am going to permit this defendant to describe what it was that he was mentioning a few minutes ago, and I will study this problem as we go along, Mr. McBride, but I will permit him at this point to describe what these papers were.

Mr. McBride: All right. But my record will be protected as to my objection.

The Court: Oh, I am sure it will, but if there is anything you haven't said and you think you should say, go ahead and put it on the record.

Mr. McBride: No. I have protected myself enough I think, at the present.

The Court: I think so, yes.

(Direct Examination Continued)

By Mr. Henss:

Q. Will you describe the papers?

A. We confiscated from the defendant 40 yellow banker slips containing 1200 straight lottery bets and eight sheets of paper containing 600 number straight lottery bets, a total of 1800 number lottery bets.

Q. Mr. Benzing, have you ever been engaged in the enforcement of lottery and book-making laws while you were on the police force?

The Court: Will you talk a little louder. I (7) can hardly hear what you say. I don't believe the jury can.

By Mr. Henss:

Q. Have you ever been engaged in the enforcement of the laws against lottery and book-making?

A. I have.

Q. How long have you been so engaged or how long were you so engaged?

A. Approximately five years all told.

Q. Were you assigned under any particular squad?

A. On this particular arrest I was assigned in plain-clothes by the captain of the district.

Q. Now, you describe some of these slips as banker slips.

Mr. McBride: I object to this, sir. This is expert testimony as to slips and not produced and ultimately to be determined by the judgment of the Court and the jury.

The Court: Yes. But my thought was that this witness would describe in detail exactly what these papers were. Instead of that he is arriving at a certain conclusion which was perhaps drawn from his experience, but we still don't have the description.

By Mr. Henss:

Q. Will you describe exactly what these slips looked like. What writing was on these slips, if any?

A. A yellow banker slip to our knowledge—

(8) The Court: Well, not to your knowledge. Tell us. Give us the size, shape, and then exactly what was on them.

The Witness: The yellow banker slip is about 3 by 7 inches. It is a yellow slip of paper, has quotations, three numbers and a dash, then the amount played on that particular number.

By Mr. Henss:

Q. Well, could you give us an example?

A. Yes. It could be number 234 dash 10 cents, 165 dash 25 cents, and so forth and so on. It could be ten, fifteen, twenty numbers on a particular yellow banker's slip.

By Mr. Henss:

Q. Now, did these slips which you found on the defendant contain numbers similar to those which you have just described?

A. They did.

Mr. McBride: I object to it and move that the answer be stricken.

The Court: What is the objection to it?

Mr. McBride: He has described generally what numbers banker's books and slips do contain, and he doesn't have them here, and all he is saying is that they contain numbers similar.

The Court: Oh, I thought you would make an
(9) obvious objection in that it was leading.

Mr. McBride: Oh, yes, we have that, sir. I don't object on that ground. Whether they are similar or not, how they are played, and so forth, are all conclusions and expert opinions, and so forth, and that is the very kind of thing the defendant would be entitled to have Your Honor see and the jury see.

The Court: Well, I think it goes back to the fundamental problem here as to whether or not a person can be tried if the evidence taken in a case of this kind is not in court. I don't remember exactly what the question was. Maybe you had better repeat your question.

Mr. Henss: I am afraid I don't remember.

Mr. McBride: Whether or not they were numbers similar on those things.

The Court: Would you read the question.

(Last question read as follows:

"Q. Now, did these slips which you found on the defendant contain numbers similar to those which you have just described?")

The Court: In view of the waiver of the leading nature of the question, I will overrule the objection.

By Mr. Henss:

Q. Would you answer, please?

(10) A. Yes, they did.

Q. Do you recall any of the specific numbers on these slips.

A. No. I don't.

The Court: What do you mean when you say you found them on him? Tell us exactly what that means, if that is what you said. I don't know whether that is the expression you used.

The Witness: Yes, sir. We found them on his person. We stopped him and searched him.

The Court: Well, now, what do you mean by that? Turn toward the jury.

The Witness: We stopped the defendant and searched him and his pocket confiscated these yellow banker's slips.

By Mr. Henss:

Q. What conversation, if any, did you have at the time you saw the defendant?

A. We questioned the defendant about the number of lottery slips we found on his person. He stated to us—

Mr. McBride: Just a minute, so that I will have my objection in. I know I am interrupting you a lot—

The Witness: That is all right.

Mr. McBride:—but I object on the ground (11) that the corpus delicti has not been proved, sir.

The Court: Overruled.

The Witness: We questioned the defendant about these number lottery slips and he stated to us that he had been picking up these numbers for about three months and receives $40 a week.

Mr. Henss: Cross-examine.

CROSS-EXAMINATION

By Mr. McBride:

Q. You didn't see him write anything, did you?

A. No, sir.

Q. You didn't see him receive anything from anyone, did you?

A. No, sir.

Q. You didn't see him hand anything to anyone, did you?

A. No, sir.

By The Court:

Q. You say you have been on the police force for twelve years?

A. Yes, sir.

Q. Explain in detail to us what your duties as a policeman have been over these twelve years.

A. For five of those years, Your Honor—four of those years I put in the vice squad. We had a vice squad in Philadelphia at that time.

(12) Q. The first four or five years—

A. Yes, sir.

Q. On the vice squad?

A. Yes, sir.

Q. Now, what did you do on the vice squad?

A. We concentrated on—

Q. Turn toward the jury.

A. We concentrated on men in the number business and fellows in pool-selling and book-making.

Q. What do you mean by that, that you concentrated on it? What did you do?

A. Well, we tried to pick up fellows that were engaged in any type of lottery.

The Court: I don't like to interpose myself into the trial of this case,— I don't think it is the function of the Judge to do it—but it does appear to me that there is a good bit of evidence here that hasn't been developed.

By Mr. Henss:

Q. Approximately how many—

The Court: Wait a minute. Mr. McBride is on cross-examination.

Mr. Henss: Excuse me.

The Court: I didn't mean to interrupt him.

(13) Mr. McBride: No. That is all right, sir.

By Mr. McBride:

Q. These slips were not dated; were they?

A. I don't recall, Mr. McBride.

Q. You, of course, do not know who wrote whatever was on them, do you?

A. No, I do not.

Q. This was October 10, 1952, at 1:45 P.M.

A. Yes, sir.

Mr. McBride: That is all.

REDIRECT EXAMINATION

By Mr. Henss:

Q. Officer Benzing, how many arrests have you made of people engaged in lotteries while you were on the vice squad?

A. Probably eight, nine hundred.

Q. It might be of some help to the jury if you would describe just what a number play is.

A. A number play—there is a man that will meet you or come to your house and he will ask you what number you want to play for that particular day, and there is generally three digits. You can put any wager you like on any particular three digits that you pick out. Some number bankers differ. Some pay four—four hundred, five hundred, six hundred to one. If that particular digit comes out on that particular (14) day, the man that took the wager from you will pay you those odds. The man that takes this wager from you gives you—generally gives you a tissue. He has a book that measures probably 3 by 7 inches, and in that book is a white slip, a yellow slip and a tissue, and it has carbons—in other words, it is a triplicate copy. When you make this wager he will give you a carbon copy. The white slip is for his information, which is kept by the writer, and the yellow slip in the book is the slip that he turns over to the pickup man, which goes to what we call a numbers bank, and he—you have a record of your number, the writer has a record of the number you played, and the bank has a record of the number you played, and at the end of the day if that particular number comes out the banker will give to the writer the amount that is to be paid to you.

The Court: Is there any evidence as to who played it? How does the banker remember who gave him the slips?

The Witness: The banker doesn't remember, Your Honor. The number writer, the writer, the individual, the fellow who writes, he has what we call a code, and

he may take plays off of maybe 200, 300 people during that course of the day, and he has a code up in the right-hand corner of the slip—take, for instance, maybe a "C" code. The banker knows that (15) that "C" Code—that one of his writers by the name of Charlie had a hit. In turn he gives Charlie the money, and in turn Charlie gives the money to the one that played that particular number. The banker doesn't know the individual who hit that particular day; the writer is the one that knows.

By Mr. Henss:

Q. How is it determined whether a certain number hit, as you say, for a given day?

A. Well, there is numerous ways. They are taken from the race tracks. They are taken from the United States Treasury reports. Each banker—in one particular day two or three different numbers have been known to come out, because some bankers work on different systems. It has been known that one bank that paid off on, say, 115, and the other bank has paid off on 722. They have a set—sometimes—most of the time it is known if 115 comes out, that is a number for that day, and everybody pays on it, but it has been known that two numbers paid off on that particular day; so there is no specific way of determining how the number really originates.

Q. Well, you say they compute it from—

A. It is only from hearsay. I mean, I—

Q. Now, is it your opinion that these slips which you found on the defendant were numbers slips or banker's slips?

Mr. McBride: I object to that.

(16) The Court: I think there is a gap in this man's testimony that hasn't been filled. For four or five years he was working on this type of thing and we don't know what type of work he did since that time. Now his testimony as an expert is at the end of the

twelve years. Perhaps you can see what is going through my mind.

By Mr. Henss:

Q. After you had served four or five years, as you said, on the vice squad, where were you then assigned?

A. I was assigned as a patrolman to the 33rd District and then—

Q. What were your duties as a patrolman in the 33rd District?

A. Patrolling my particular sector in the red car, police car.

Q. Did you engage in the suppression of lotteries at that time?

A. I did.

Q. Did you make any arrests?

A. I did.

Q. Approximately how many?

A. About 55.

Q. After that where were you assigned?

A. I was assigned as a captain in plainclothes.

(17) Q. For how long?

A. Approximately a year.

Q. And what were your duties?

A. Same duties I had in the vice squad.

Q. And what was that?

A. That was to apprehend number men or men that was engaged in any sort of illegal lottery.

Q. Did you make any arrests?

A. I did.

Q. Approximately how many?

A. Approximately 50 to 75.

Q. And then where were you assigned?

A. I was then assigned to the 29th District, 50th and Lancaster.

Q. And how long have you been assigned there?

A. Approximately three years; two and a half years.

Q. Are you presently assigned there?

A. Yes; I am.

Q. And what are your duties in the 29th District?

A. I am in uniform in a patrol car.

Q. Do you engage in the suppression of number and lottery plays?

A. Not specifically.

Q. Have you made any arrests of numbers writers?

(18) A. Yes; I have.

Q. Approximately how many at that time?

A. Approximately 20.

Q. Now, over the years have you been familiar with the operation of the numbers bank?

A. The numbers bank?

Q. That is right, or the numbers racket or the numbers game.

A. Yes, sir. I am pretty well familiar.

Q. And as a result of your experience have you formed an opinion as to what these slips which you confiscated from the defendant contained, what they were?

A. Yes, sir.

Q. And what were they?

Mr. McBride: That is what I object to.

Mr. Henss: In your opinion.

The Court: I will overrule the objection. In fact, I think it has been answered.

The Witness: Number lottery plays.

Mr. Henss: That is all.

Mr. McBride: That is all.

Mr. Henss: Officer Kelly.

(19) EDWARD L. KELLY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. Mr. Kelly, by whom are you employed?

A. By the Philadelphia Police Department.

Q. And how long have you been so employed?

A. Twelve years.

Q. And what has been your experience on the Police Department? Where were you first assigned?

A. In the Police Department?

Q. Well, as—

A. As a patrolman.

Q. As a patrolman. How long were you so assigned?

A. As a patrolman?

Q. Yes.

A. About eight years.

Q. And what were your duties?

A. At that time I was assigned to a red car, patrol car.

Q. Were you engaged in the enforcement of the laws against lottery and book-making?

A. At that time; no.

Q. Did you make any numbers arrest during that time?

A. No, not at that time I didn't.

(20) Q. After that where were you assigned, and what duty were you assigned to?

A. After that I went to the vice squad with Officer Benzing.

Q. And how long were you so engaged?

A. Well, at that time I would say about four months in the vice squad.

Q. And what were your duties?

A. Illegal lottery, book-making, all kinds of vice.

Q. During that time did you make any arrests?

A. I did.

Q. For violation of the lottery and book-making laws?

A. I did.

Q. And approximately how many arrests did you make?

A. I would say 100, 125, approximately.

Q. And to what squad are you now assigned?

A. Inspector Ballard's North Central Division, Plain-clothes.

A. And how long have you been so assigned?

A. It is ten months, January 13 up to the present time.

Q. And what are your duties?

A. Same as—all conditions of vice, lottery—

Q. Pardon me. I didn't hear that.

A. All vice conditions.

Q. Are you engaged in the suppression of numbers writing and pool-selling, book-making?

(21) A. I am.

Q. And during that time how many arrests have you made for such violations?

A. I will say about 300, 300 to 400.

Q. Now, during the time that you have been engaged, you have been employed in the police force, approximately how many arrests in all would you say you have made for the violation of the laws against numbers writing and pool-selling?

A. I would say 300 arrests was made.

Q. And were you with Officer Benzing on October 10, 1952?

A. I was.

Q. Will you tell us what happened?

A. Well, Your Honor, on—

Mr. McBride: Pardon me. So that he can tell a connected story without my jumping up and down, will Your Honor let me now reiterate—

The Court: Surely.

Mr. McBride:—the same objections with respect to every part of his testimony that I made with respect to Officer Benzing's?

The Court: Surely.

Mr. McBride: Very good, sir.

The Court: Go ahead.

The Witness: Your Honor, about 1:45 on (22) October 10, about 2 P.M., we observed the defendant walking west on Catharine, and at 9th and Catharine we approached the defendant and confiscated from his person a quantity of number paraphernalia, and confiscated from his person 40 yellow banker's slips containing 1200 straight lottery bets, and eight sheets of papers containing 600—a total of 1800 straight number lottery bets showing names and initials of various numbers writers. We questioned the defendant and he said he had been picking up these numbers for about three months and gets $40 per week.

By Mr. Henss:

Q. Would you be able to describe these slips of paper which you confiscated in more detail?

A. Well, the only thing I can do is tell you just like Officer Benzing told you, these yellow slips—it is 3 inches by 7, and three digits, and besides that, next to it is another figure like 10 cents or 5 cents or a quarter. See—

Q. About how many of these rows of digits did you find on one of these slips?

A. Very little. Some has four; some has ten; some has fifteen on each slip.

Q. And it is your opinion that these—did you form an opinion as to what these digits were on these slips of paper which you confiscated?

(23) A. They were, as far as my opinion, numbers play for that day.

Mr. Henss: Cross-examine.

CROSS-EXAMINATION

By Mr. McBride:

Q. Now, you don't remember any particular numbers that might have been on these slips; do you?

A. No, I don't.

Q. Your statement in the answer to the question was based upon your general recollection of what you described as numbers books look like?

A. Yes.

Q. Now, you didn't see him write anything, did you?

A. No, I didn't.

Q. You didn't see him receive those slips from anybody?

A. No, I did not.

Q. You didn't see him give them to anybody?

A. No, I did not.

Q. You just stopped him on the street and upon searching him found them?

A. That is right.

Q. These slips were not dated, were they?

A. Well, I can't remember that now.

Q. As a matter of fact, you can't remember or describe (24) what any particular slip looked like, can you?

A. No, not now, not today; no.

Mr. McBride: That is all.

REDIRECT EXAMINATION

By Mr. Henss:

Q. At the time that you arrested the defendant did you have any question in your mind as to whether these were number slips?

Mr. McBride: That is objected to, sir.

The Court: What was that question exactly?

(Last question read.)

The Court: That objection is sustained. He has already given his opinion on that.

Mr. Henss: That is all.

Mr. Henss: Mr. Capone.

MARIO CAPONE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. Where are you employed, Mr. Capone?

A. Quarter Sessions of the Court of Philadelphia.

Q. And what are your duties?

(25) A. They are clerk and custodian of these records.

Q. You are the custodian of the records of the Court?

A. Quarter Sessions Court.

Q. Now, at the Government's request did you bring with you the official records in the case involving Victor Calamaro?

A. I did.

Mr. McBride: May I inspect them?

Mr. Henss: Surely.

Mr. McBride: Is it all right with Your Honor if I do?

The Court: Surely.

By Mr. Henss:

Q. Mr. Capone, what is the court term and number of that case?

A. 1275, October Sessions of 1952.

Q. Do you have the indictment with you?

A. I have.

Q. Would you kindly read it, please.

Mr. McBride: I object to this, sir, first because the corpus delicti has not been proved and therefore any information thereon contained, whether in the form of an admission or not, is inadmissible here, and, secondly, it is not necessary; it is not probative of anything in this case in that one of the counts of the indictment is not such as would (26) make one liable to payment of the Government tax. That is, whatever happened in that case does not necessarily impose liability for a federal tax or have any relevance to it.

The Court: Well, I still don't understand the purpose of this question at all. I don't know whether it is the type of thing that you can explain to me without coming up to the bench and explaining to me.

(Side-bar discussion off the record.)

The Court: The objection is overruled.

Mr. Henss: Would you read the question, please.

(The question was repeated by the reporter, as follows:

"Q. Would you kindly read it, please.")

The Witness: On Bill No. 1275 of October Sessions of 1952, Commonwealth versus Victor Calamaro, residing then at 1736 Ritner Street, Philadelphia, Pennsylvania, charged with setting up an illegal lottery.

On October 29, 1952, at the grand inquest a true bill was had and on May 26, 1953, the defendant, being arraigned in room 443, City Hall, pleaded guilty as charged. He was fined $200 and costs or 30 days at Philadelphia County Prison by Judge George Griffiths, specially presiding from the 47th Judicial District of Pennsylvania.

(27) By Mr. Henss:

Q. Mr. Capone, will you read the specific charges in detail of the indictment?

Mr. McBride: It is a pretty long one. If you want, I don't see that I would object so far as the reading is concerned, but it might serve the same purpose if it is offered in evidence.

The Court: Well, if it is offered in evidence then Mr. Henss will undoubtedly want to read it to the jury right afterwards.

Mr. McBride: Then we might as well read it, because I persist in the other objection that I made before Your Honor. Then I will say nothing further, sir, and I understand you do offer it in evidence and now ask him to read it?

Mr. Henss: Yes.

Mr. McBride: Now I have objected to his offer in evidence; but since it is in evidence under Your Honor's ruling, I would object to his reading.

The Court: The objection is overruled and the exhibit is admitted.

(Indictment No. 1275, October Sessions, 1952, Commonwealth versus Victor Calamaro, was marked Government's Exhibit No. 1 in evidence.)

(28) The Court: Now the witness can read it or you can read it, whichever you please.

By Mr. Henss:

Q. Would you read it, please?

A. Yes, sir.

"In the Court of Quarter Sessions of the Peace, of the County of Philadelphia, October Sessions, 1952 County of Philadelphia, ss.:

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the County of Philadelphia, upon

their respective oaths and affirmations, do present, That

Victor Calamaro

late of the said County, yeoman on the tenth day of October in the year of our Lord one thousand nine hundred and fifty-two; at the County aforesaid, and within the jurisdiction of this Court, unlawfully did publicly erect, set up; open, make and draw a certain lottery for moneys, goods, wares and merchandise; contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid upon their oaths and affirmations aforesaid, do further present, That the
(29) said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did publicly erect, set up and open a certain lottery for moneys, goods, wares and merchandise: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did privately erect, set up, open, make and draw in a certain building in the City of Philadelphia aforesaid, a certain lottery for moneys, goods, wares and merchandise: contrary to the form of the Act of the

General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania

And the Grand Inquest aforesaid, upon their oaths and affirmation aforesaid, do further present, That the
(30) said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did privately erect, set up and open in a certain building in the City of Philadelphia aforesaid, a certain lottery for moneys, goods, wares and merchandise; contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully was concerned in the management, conducting and carrying on of a certain lottery for moneys, goods, wares and merchandise, then and there unlawfully and publicly erected, set up and opened and to be drawn; contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and
(31) affirmations aforesaid, do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully was concerned in the management conducting and carrying on in a certain building in the City of Philadelphia aforesaid, of a certain lottery for moneys, goods, wares and merchandise, then and there privately erected, set up, opened and to be drawn; contrary to the form of the Act of General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did have in his possession with intent to sell, and unlawfully did sell a certain lottery and numbers policy: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Penn-
(32) sylvania."

Now, it is signed by Richardson Dilworth, District Attorney of Philadelphia, and from there on there is a line which strikes out the reading of that bill of indictment.

Q. That is not necessary. Do you have the plea?

A. Now, wait, I am not finished yet. In the rear of the bill of indictment it reads: the witness, Commonwealth witnesses: Patrolman Kelly No. 2892; Patrolman Benzing, No. 4175, 33rd Police District; bail was set in the sum of $300 by Magistrate Coyle; and the bailee was Peerless Casualty Company from 11 North Juniper Street, Philadelphia, Pennsylvania.

On May 26, 1953, the defendant paid the fine imposed by Judge Griffith in the amount of $225.13.

Mr. Henss: That is all. Cross-examine.

Mr. McBride: No questions.

Mr. Henss: Mr. Tursi.

JOSEPH TURSI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. By whom are you employed, Mr. Tursi?

(33) A. Police Department, Philadelphia.

Q. And what position do you hold?

A. Police clerk.

Q. And what are your duties as a police clerk?

A. Oh, I hold the evidence until it is ready for court.

Q. Do you have any other duties concerning the evidence?

A. No, that is the only one concerning the evidence.

Q. And at the Government's request did you bring with you the records concerning the arrest of Victor Calamaro together with any evidence which you might have in your possession—

A. I did.

Q. —in that case?

A. I did.

Q. Did you bring the evidence?

A. No, sir. I haven't.

Q. Why not?

A. Well, the only evidence I have here is a confiscation, a slip of confiscation by the court.

Mr. McBride: I didn't hear your statement. Could you raise your voice and repeat what you said?

The Witness: The only evidence I have here is a slip containing notes that the banker's slips was confiscated by the court.

Mr. McBride: I move that that be stricken, sir, (34) both because of the characterization of the slips, which would be no part or the making of any such record, and as to the action of any court, that doesn't prove a court record that way.

The Court: Well, I think your second point is well taken. The record has to speak for itself. This man can't interpret the record.

Mr. Henss: Could I see the record?
Would you mark this.

(Police Department record was marked Government's Exhibit No. 2 for identification.)

By Mr. Henss:

Q. Mr. Tursi, I show you G-2. Can you show me what it is?

Mr. McBride: Which one is that?

Mr. Henss: That is the white slip.

Mr. McBride: And you are asking him what it is?

Mr. Henss: Yes.

The Witness: Yes. I have no knowledge what G-2 would mean on this particular slip, unless it was offered in evidence in some other case.

By Mr. Henss:

Q. Well, what is the white paper itself?

A. Oh, it is a form that we use in the Police Department (35) noting the disposition of a certain case. That is for our files only.

Q. Is it in the regular course of your business to keep such forms?

A. Yes, sir. It is.

Q. By the Police Department?

A. Yes, sir.

Q. And that particular form, was that kept by the Police Department regular course of business?

A. Yes, sir.

Q. Would you kindly read that G-2.

Mr. McBride: I would like to cross-examine him.

The Court: Go ahead.

CROSS-EXAMINATION

By Mr. McBride:

Q. Now, not speaking of the form in general, but speaking of that particular paper, have you ever seen it before you came into court?

A. If I presented this particular paper in court?

Q. No. Have you ever seen that particular paper before coming to court here with it?

A. Yes, sir. We make them out.

Q. Now, did you make that one out?

(36) A. I myself hadn't made this one out.

Q. Do you who did?

A. Another clerk in the Chief Clerk's Office.

Q. Who was it?

A. I wouldn't have any knowledge of that.

Q. Do you know when it was made?

A. I wouldn't know that, either.

Q. That is, it might have been made in response to a subpoena for this case?

A. No, sir. Just as soon as we get a disposition on a case these forms are made out.

Q. And by a clerk in the Office of the Commissioner of Police?

A. Chief Clerk's Office.

Q. Chief Clerk's Office. That is, someone comes into your office and tells you something; is that right?

A. They bring back a slip, either the evidence concerned or a disposition slip such as this one.

Q. And then as a result of a slip that someone brings back that white paper is made out by a clerk?

A. For our files.

Q. And then it remains in your files?

A. Until it is called for; yes.

Q. Are you able to tell us that that was the history of (37) this white paper?

A. Yes, sir.

Q. You don't see any court records, do you?

A. No. I don't.

Q. Whether the information that is brought back to you is correct or incorrect you do not know?

A. Well, it is usually signed by a district attorney or someone from the court.

Q. Still no matter who signs it you personally do not know whether the information contained thereon is correct or incorrect, do you?

A. I cannot say so truthfully.

Q. Your answer was no, that you cannot say so?

A. That is right.

Q. Now, do you have anything signed by the district attorney in this case?

A. I do.

Q. You point to the word "Crippin." Who wrote that?

A. Why, I imagine it would be Crippin.

Q. It is correct that you are imagining that?

A. Yes, that is correct.

Q. You don't know that that is—

A. No, I couldn't state as a fact.

Q. Of course not. It has the name "Griffith" there. Who (38) signed that?

A. Supposedly Judge Griffiths.

Q. Supposedly. And who signed Ed Kelly, 2792?

A. That would be the officer.

Q. And "33rd Police District?"

A. The officer.

Q. Isn't it obvious whoever signed them signed them all?

A. Well, to me it is, but I have seen it come through like that that the officers have given us the disposition of the case.

Q. Well, in answer to my question you say it seems to you that the person who wrote "Crippin," "Griffith," "Ed Kelly, 2792," and "33rd"—that the same person wrote them all?

A. I would say so.

Mr. McBride: That is all. I object to it.

By the Court:

Q. Where did you get this paper that is now marked G-2, I believe?

A. Sir, that is handed down to us as the officer comes back to me—

Q. No—where did you get it, that paper itself when you came to court this morning? Where did you get that paper?

A. From our files.

Q. Is that a file that is kept in the regular course of (39) business of the Police Department?

A. Yes, sir.

Q. In the department where you are a clerk?

A. Yes, sir.

The Court: Overruled.

(Direct Examination Continued)

By Mr. Henss:

Q. Will you read G-1.

A. It is a Police Department form. It is a white slip of paper and the first reading on it would be the date, which was 5-26-53.

The Court: Would you talk a little louder. I can hardly hear it.

The Witness: The first thing I have noted on here is the date, which was 5-26-53, in the case of Victor Calamaro versus Commonwealth, arrested by Officer Kelly of the 33rd District, charged with lottery; the case was disposed of, the defendant being found guilty and sentenced to $200 fine and cost by Judge Griffiths. The following articles held as evidence in the case were confiscated by Assistant District Attorney Crippins. Articles: 40 slips, 8 sheets.

Mr. Henss: That is all. Cross-examine.

Mr. McBride: No questions.

Mr. Henss: You may step down.

(40) Mr. McBride: Can we detach the white one?

Mr. Henss: Mrs. Friel.

ELEANOR H. FRIEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. By whom are you employed?

A. By the Treasury Department in the Office of the Collector of Internal Revenue, 9th and Chestnut.

Q. And what position do you hold?

A. My position is tax account specialist.

Q. And what are your duties?

A. My duties are to analyze and evaluate outstanding accounts.

Mr. McBride: Will you please, Mrs. Friel, keep your voice up a little bit.

The Witness: All right.

By Mr. Henss:

Q. Now, at the Government's request did you search the records to determine if Form 11-C and the special oc-

cupational wagering tax have been filed and paid by Victor Calamaro for the year July 1, 1952 to June 30, 1953?

(41) A. Yes, I have examined the records.

Q. And what did you find?

A. There is a return Form 11-C on file in the case of Victor Calamaro, 1736 Ritner Street, Philadelphia, Pennsylvania, for the period from October, 1952, to June 30, 1953.

Q. And what date was that filed?

A. Well, I am afraid that I am not in a position to answer that. It appears on the Director's records on October, 1953, Account No. 40315.

Q. Whom is it signed by? Whom was this Form 11-C signed by?

A. Well, I do not have the return but it is available.

Q. As to the tax did you search your records? Did you search your records as to the special occupational tax?

A. Yes, I did.

Q. What did you find?

A. The records indicate that there was an assessment set up in the amount of $56.25. That included tax which was prorated, penalty and accrued interest.

Q. And has it been paid?

A. A portion of it was paid.

Q. When?

A. The records indicate payment on July 8, 1954, in the amount of $28.25.

(42) Q. Is there an amount still outstanding?

A. There is a tax assessment in the amount of $28 outstanding. That is all.

Mr. Henss: Cross-examine.

CROSS-EXAMINATION

By Mr. McBride:

Q. When was this assessment set up?

A. The assessment was set up in October, 1953.

Q. Was anyone notified of it?

A. Of the assessment being set up?

Q. Yes.

A. Well, I wouldn't be qualified to answer that.

Q. That is, for all you know the alleged taxpayer may not have been notified that the assessment was set up?

A. From my knowledge.

Q. From your knowledge?

A. I would say I—

Q. About this particular case?

A. I wouldn't be qualified to answer that.

Q. May I ask to look at the records from which you testified? This is the only sheet to which you referred, Mrs. Friel?

A. That is correct.

Q. Now, let me ask you about this. You indicated that the (43) amount assessed was in October, 1955. Am I correct on that?

A. No. October, 1953.

Q. October, 1953. What says that the amount assesed was on that date?

A. October, 1953, lists the amount of taxes, $41.67.

Q. When was this penalty of $10.42 put on?

A. That was put on at the time the assessment as set up.

Q. That is, you can tell that by just examining this record?

A. Well, I examined the records in the Director's Office.

Q. You did?

A. This is copied directly in the Director's Office.

Q. Oh, you made your paper up for purposes of bringing it to court?

A. That is correct.

Q. This is not a record of the Director's Office, is it?

A. It is a copy of the records of the Director's Office.

Q. And does it contain all the information that is contained in the Director's Office about this account?

A. It contains all the information on our bookkeeping records, indicates the dates that notices were sent to the taxpayer.

Q. Now, it has a column here, "Adjustment of Over-Assessment." What is that column?

A. Well, there has been no over-assessment in this case. (44) We use that as a record column to indicate the dates that notices have been sent out and outstanding balances.

Q. Now, you indicate that as to payment there was a payment of $28.25, which is more than half of the total amount assessed?

A. That is correct.

Q. And that there is a balance of $28.

A. Right.

Q. Now, you have the word "incomplete" on here and it disturbs me a little bit, since this is a copy of the Director's records. Does that mean that this copy is incomplete or what does it mean?

A. It doesn't mean that the record is incomplete: it means that the return was not signed by the taxpayer.

Q. I see—that the return itself was incomplete?

A. That is correct.

Q. Now, how do you know that that was the nature of the incompleteness of the return? Did you see the return?

A. Yes, I did.

Q. Do you have it with you?

A. No. I do not.

Mr. McBride: All right. Thank you, Mrs. Friel.

That is all, sir.

Mr. Henss: That is all.

(45) The Court: We had better recess until 2 o'clock.

Mr. Henss: I would just like to complete the case and just offer this in evidence, Your Honor.

The Court: I think I have already ruled, but perhaps not as specifically as I might have. G-1 was admitted and I understand Mr. McBride objected to it.

Mr. McBride: I assumed Your Honor ruled on that.

The Court: Yes, I did.

Mr. McBride: Yes, I acted on that assumption.

The Court: D-2 is received in evidence.

Mr. Henss: Your Honor, could I have permission to have that photostated over the noon hour, so that it may be returned to the City Hall records?

The Court: Maybe it can be returned this afternoon, anyway.

Members of the jury, you will be excused now until 2 o'clock this afternoon. Come back here at 2 o'clock. Don't discuss the case with anyone in the meantime. Come back and take the seats you now occupy. This is Courtroom No. 3.

(Recess at 12:30 o'clock, P.M.)

(46) AFTERNOON SESSION

PRESENT: Counsel as before noted.

Mr. Henss: Your Honor, I believe that completes the Government's case.

GOVERNMENT RESTS

Mr. McBride: May it please the Court, I wonder if you could agree with me, Mr. Henss, on a couple of the dates. I will put the evidence on the record out of the presence of the jury, if Your Honor wishes, but I think it is important that it be on the record in this case. Perhaps we had better see Your Honor a moment at side bar.

Mr. Henss: I have objection to the testimony, Your Honor.

Mr. McBride: You have no objection?

Mr. Henss: I have objection to the testimony.

(Side-bar conference as follows:

Mr. McBride: I ask to have it noted of record that this statute was declared unconstitutional by a Judge in this Court in the case of United States versus Kahriger, No. 16672, reported at 105 Fed. Sup. 322 on (47) May 6, 1952, that that judgment of unconstitutionality was in effect until reversed by the Supreme Court of the United States in United States versus Kahriger, reported at 345 U.S. at page 22, which was decided on March 9, 1953.

Therefore, the offense charged to have been committed in this case was committed at a time when this Court had held the statute unconstitutional and while that decision was in full force and effect.

Mr. White: Mr. Henss, I would like to say something to the Judge.

If Your Honor pleases, I think there is a conclusion of law in Mr. McBride's statement, namely, that the decision declared the law unconstitutional and was in full force and effect until reversed. I assume that you didn't intend us to stipulate.

Mr. McBride: Oh, no, not to stipulate as to any question of law. I want to get the facts on record so that Your Honor can decide this question, and I believe it also presents a jury question if Your Honor overrules it as a matter of law.

Mr. White: I think the fact that the decision was appealed would be relevant. Do we have that? You can get that from the docket entries.

(48) Mr. McBride: I have no objection to Your Honor taking judicial notice of it but it seems to me that it is not relevant or material, but if it is relevant or material—

The Court: I can take judicial notice.

Mr. McBride: Yes. I have no objection to that at all.

Mr. White: I think this appeal was very, very timely. It generally is when there is an Act of Congress declared unconstitutional.

Mr. McBride: It would appear that the Government did appeal directly to the Supreme Court of the United States under 18 U.S.C. 373(1). No order of supersedeas had been granted. That is, the judgment of the District Court had not been stayed or in any way interfered with or postponed until decision by the Supreme Court on the appeal.

The Court: Was the indictment found before or after the Supreme Court decision?

Mr. McBride: The indictment in this case was found after the Supreme Court's decision but after this man had gone down there, subsequent to the Supreme Court decision, paid $28 on this account.

It is understood that these facts will be on (49) the record here as a matter of evidence or by reason of judicial notice for the purpose of considering a motion for judgment of acquittal.

I now make such a motion. That is, I move for judgment of acquittal.

The Court: Denied.

Mr. McBride: Now, do you want to hear argument on any of these points?

The Court: No. For present purposes I can't do anything else. If I decided any other way I would foreclose any other Judge in this Court from even considering it.

Mr. McBride: All right; but how about on the evidence, the fact that the evidence isn't here? That applies only to this case.

The Court: Well, you can argue that if you wish.

Mr. White: Judge Clary ruled the other way on that.

Mr. McBride: That is right. He ruled the other way in a case I tried before him sitting without a jury wherein he ruled that the pickup man was not responsible under this statute. He also ruled that the failure to produce the slips themselves was not fatal.

(50) The Court: Well, I will follow his ruling on the second point.

Mr. McBride: And not on the first?

The Court: Well, I think this Court of Appeals, even though it is not our Circuit, decides differently, so I will go along with that.

Mr. McBride: All right. There is no use in arguing it, then?

The Court: No.

Mr. McBride: I make my motion and I rest.

The Court: Yes.

(End of side-bar discussion.)

(Mr. Henss argued the Government's case to the jury.)

(Mr. McBride argued the defendant's case to the jury.)

(During Mr. McBride's argument, the following occurred:

Mr. McBride: Now, the second point. The second point is this, and we put in evidence. You may take it from the Court but I will first state it to you because the Court has indicated that he will take judicial notice of it.

Here is a man, member of the jury, who is (51) charged with not paying a tax on October 10, 1953, and they say that that is a criminal action. This is a Criminal Court and they want to convict him of a crime of not paying this tax on October 10, 1952, and they indicate to you the fact that he made a partial payment late—

Mr. Henss: Mr. McBride. May I see Your Honor at side bar? I think maybe I misunderstood something. May I see you at side bar?

(Side-bar discussion as follows:)

Mr. McBride: The argument I propose to make to the jury to be considered by them on the issue of criminal intent is that this indictment charges that the offense was committed on October 10, 1952, and that in this District His Honor, Judge Welsh, on May 6, 1952, held that this statute was unconstitutional and therefore no duty arose upon any citizen to file or pay any such tax, that that decision stood without stay or hindrance until the Supreme Court on March 9, 1953, reversed it, and that, therefore, they could properly consider that on the issue of whether this defendant in this criminal trial should be or can be subjected by their judgment to a criminal penalty.

The Court: See, that is the whole point of the argument that is coming up and I don't want to (52) decide that here.

Mr. McBride: Well, how does that stop me from arguing it to the jury?

The Court: Well, my ruling is that it is irrelevant at this time.

Mr. McBride: Have you thought that over carefully, Judge?

The Court: As much as I can.

(End of side-bar discussion.)

(Mr. McBride concluded his argument to the jury.)

The Court: Mr. Henss, let me have that photostat and the part that is relevant here.

Mr. McBride: May it please the Court, could I correct the record? I did say formally when I was at side bar that I rested. I did not say formally that I renewed my motion for judgment of acquittal. Would Your Honor accept it as though I had said that then?

The Court: Yes.

Mr. McBride: That is, that Your Honor has before you a motion for acquittal.

The Court: Surely.

(53). **CHARGE OF THE COURT**

GRIM, J.:

Members of the jury, you are the sole judges of the weight of the evidence and the credibility of the witnesses who have testified before you and the inferences to be drawn from the evidence. You are not bound to take the testimony of any witness as absolutely true, and should not do so if you are satisfied from all of the facts and circumstances in evidence before you that such witness is mistaken, or for any other reason the testimony is untrue or unreliable.

In determining the weight and credibility of the testimony, or any part thereof, you may and should consider the relation of each witness to the case or to the parties, their interest, if any, in the case or the result of the case; their temperament, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence or means of information concerning the things of which they testified; their situation and ability to know the matters to which they have testified; the reasonableness or unreasonableness of their testimony; and give such weight and credit to the testimony of each witness as under all of the facts and circumstances in evidence you believe it fairly entitled to receive.

(54) The defendant in this case is Victor Calamaro, whom you have seen sitting here in the courtroom. He has been indicted under a statute or an Act of Congress of the United States which in certain sections reads as follows:

> "A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wages for or on behalf of any person so liable."

Another section is:

"Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Another section states:

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable for the payment of the tax, be fined not less than so much and not more than so much."

The amount isn't particularly important to you. That will be for a Court later on to decide in imposing sentence, if you should find that this defendant is guilty (55) in accordance with the way that I am charging you.

The indictment in this case brings the charge against this defendant and it is the foundation upon which the case must be based. The indictment reads as follows:

"That on or about the 10th day of October, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, Victor Calamaro, being a person liable for the payment of Special Occupational Tax imposed by Title 26 U.S.C., Section 3290, did accept wagers as defined in Title 26 U.S.C., Section 3285, without having previously paid the Special Occupational Tax imposed by Section 3290 due and owing to the United States.

"In violation of Title 26 U.S.C.," and so forth.

Mr. Calamaro, the defendant, has pleaded not guilty. A plea of not guilty by a defendant is in legal effect a denial of every essential allegation of the indictment and

puts upon the Government the burden of proving the same to be exclusion of every reasonable doubt and substantially as charged in the indictment.

An indictment is not to be considered by you as evidence against a defendant. An indictment is merely a necessary means of placing a defendant on trial and raises (56) no presumption against him.

A defendant is presumed to be innocent of all the charges against him until he has been proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case, including your deliberations in the jury room, that you are satisfied of his guilt beyond a reasonable doubt.

A reasonable doubt is what the term implies—a doubt founded upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. If after considering the evidence in the case you have such a doubt in your mind as would cause you or any other reasonable or prudent man or woman to pause or hesitate before acting in a grave transaction of your own life, then you have such a doubt as the law contemplates is a reasonable doubt.

I will go over the evidence briefly with you. You must remember, though, that you are the sole judges of the facts in the case and that if I should misstate any of the evidence in the case you must consider it as you heard it and not necessarily as I give it to you. Of course, I will do my best to review the evidence exactly as I remember it.

(57) You will remember that there were two city policemen who took the stand here, Officers Benzing and Kelly. As I remember it, they both testified that on October 10, 1952, at about 1:45 o'clock in the afternoon, they met this defendant, Victor Calamaro, and upon searching him found certain slips of paper on him, certain yellow slips of paper, which I think were described as being something like 3

inches by 7 inches. They both testified that from their knowledge of the numbers business, the selling of numbers, as I believe it is sometimes called, in their opinion these slips of paper were what they described as numbers slips. If I did not put that exactly right you must remember it as you heard it and not necessarily as I gave it to you. I am not too familiar with the terms that are applied to this business, but I have done my best to repeat it to you as I believe these witnesses testified.

Officers Benzing and Kelly testified that upon questioning Victor Calamaro he admitted that for several months he had been picking up numbers or numbers slips, or whatever they were, and that he was paid $40 a week for so doing.

In addition to that, the Government has introduced into the evidence of the case a record from the Court of Quarter Sessions of Philadelphia County. That is a state (58) court which is held up in City Hall. That record indicates that a Victor Calamaro pleaded guilty to a lottery charge. You will remember from the evidence exactly what it was. I don't remember exactly how the charge was written. After his plea of guilty he was sentenced on this charge which was based on an incident which occurred, as I remember it, on October 10, 1952.

The Government then put on the stand Mrs. Friel who testified to the effect that she had looked over the records in the Office of the Bureau of Internal Revenue and that the records indicated that this Special Occupational Tax has not been paid in full. You will remember that the statute said that the tax is $50. The records indicated that $28.25 had been paid but that the full $50 had not been paid, and I believe the records indicate that the tax had been paid in 1954.

Now, along with that I will call to your attention a section of the statute which I already have quoted to you but which I will quote to you again. It says:

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable for the payment of the tax, be fined so much and so much."

In other words, if he does these things with- (59) out having paid the tax, he becomes criminally liable under this section of the statute. In other words, if this tax is paid late, as I understand this statute, he can be found guilty under this section of this Act of Congress that I have read to you.

There is an important element in this case that you will have to consider carefully. The Government is charging this defendant with having committed a crime as laid out in the indictment which I have read to you. However, the papers that were described as numbers slips by these policemen have not been produced in court. You will consider that carefully and determine what weight you wish to put upon that element in the case. As I understood the defendant's contention, he argues that because these slips have not been produced in court that you should refuse to believe these witnesses who have testified that they found these slips on this defendant. That will be for you to determine. There was an explanation to the effect that the slips were confiscated by the District Attorney's Office up in City Hall and that that is why the slips were not here; but, nevertheless, they are not here. You will put such weight on that element in the case as you think it deserves.

The defendant, Victor Calamaro, has not testified in the case, as you will remember. The defendant has a (60) right not to testify, and the failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him. I charge you that you must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact in any manner enter into your discussions during your deliberations in the jury room.

Your function will be to find this defendant either guilty or not guilty. Your verdict will have to be unanimous.

There may be and probably will be differences among you members of the jury when you first go to the jury room, but whatever differences there are will have to be resolved and your verdict will have to be a unanimous one.

Do counsel have any comments?

Mr. McBride: First, may it please the Court, in stating that I had argued that that affected the credibility of these officers as to whether or not they got slips from him, I should like to correct that, if I may. I was not talking about the untruthfulness of the officers, not saying they did not get slips from his person. I was directing my argument only to the character of the slips, that there were slips. I was talking only of slips, what they were, and not whether they had actually done what they said.

The Court: Very well. I am sorry if I misunder- (61) stood your contention.

Mr. McBride: That is quite all right, sir. I was sure it was a complete inadvertence.

The Court: I wanted the jury to understand your contention and I think the jury now understands it.

Mr. McBride: And finally, sir, I ask an exception to Your Honor submitting the case to the jury at all.

The Court: All right.

Mr. Henss: Your Honor, would you clarify to the jury that if they find that the defendant, Victor Calamaro, picked up numbers as he had told it to the policemen, if they believed the policemen's testimony then he was liable to pay the tax under Sections 3290 and 3294 of Title 26, U.S.C.A.

The Court: Mr. Henss, I have read the statute to the jury. I have read the exact words of the statute. I have

gone over the facts. From now on it is the jury's problem, I think.

Mr. Henss: Exception, Your Honor.

The Court: Yes. Of course, I have read the indictment to them, also.

The Deputy Marshal may be sworn.

(Deputy Marshal George Gehringer, sworn.)

(The jury retired at 3:00 with Government's Exhibit No. 2.)

(62) The Court: Do either of you want the indictment to go to the jury?

Mr. McBride: The indictment in this case?

The Court: Yes.

Mr. McBride: It is a matter of complete indifference to me, Your Honor.

Mr. Henss: It is the same with me, Your Honor.

The Court: Well, then we won't send it to them.

Mr. McBride: I will specifically waive it. If there be a right to have it go out, I will specifically waive it.

The Court: I think it is a matter of discretion with the Judge.

Mr. McBride: As long as you have given them the essential elements of the charge.

Mr. Lilly: Do I understand it is not to go out?

The Court: Not to go out.

(At 3:35 o'clock, P.M. at the request of the jury and after consultation with counsel for both parties, the Court permitted a copy of the information to be given to the jury in the jury room for use during their deliberations.)

(63) (The jury returned at 3:50 P.M.)

(Counsel as heretofore noted.)

The Clerk (Mr. Spann): Members of the jury, have you arrived at your verdict?

The Foreman: We have.

The Clerk: How say you, do you find the defendant, Victor Calamaro, guilty or not guilty as charged in this information?

The Foreman: Guilty.

A. Juror: We find him guilty as charged.

The Clerk: Members of the jury, hearken unto your verdict as the Court hath recorded it. In the issue joined between the United States of America and Victor Calamaro you say you find him guilty in the manner and form as he stands informed against, and so say you all?

Several Jurors: Yes.

The Court: Thank you very much, members of the jury. You will be excused now until 10 o'clock tomorrow morning. Come back to the jury room at that time.

(Jury out at 3:55 o'clock P.M.)

Mr. Henss: Your Honor, could I move for imposition of sentence now?

(64) Mr. McBride: May it please the Court, I renew my motion for a judgment of acquittal or in the alternative for a new trial, and I think the questions are very substantial, and if the motion of the Government were entertained and sentence were imposed, then the only thing would be to go up on appeal, and I think that I would rather see Your Honor review this whole question at leisure.

The Court: I think the wise thing for me to do is to give you an opportunity to file your motions, and so on, and

argue these matters at length, and then sort of work them together with the arguments in the Kossman cases.

Mr. McBride: I would add that the bail stand up until the judgment of the Court, and, therefore, he is still under bail as of this moment despite the verdict.

The Court: Any objection to that?

Mr. Henss: No.

The Court: Well, the same amount of bail will stand.

OPINION.

(Filed Jan. 9, 1956.)

January 9, 1956

GRIM, *J.*

Defendant has been convicted of failing to pay the $50 special gambler's tax imposed yearly by the Internal Revenue Code, 26 U. S. C. A. Sec. 3285 et seq.[1] He has moved for judgment of acquittal or in the alternative for a new trial.

The government called as witnesses two Philadelphia police officers who had had many years of experience in the suppression of vice and much experience in the suppression of numbers gambling. They testified that they arrested defendant on October 10, 1952, and that at this time he had in his pockets 48 sheets of paper which were three inches wide and seven inches long. On these sheets of paper were 1800 notations of numbers, each one of which was a three digit number followed by a dash and another number. The officers described the slips of paper as "banker slips" and testified that from their experience in the numbers gambling business it was their opinion that the numbers on the sheets were notations of lottery bets or wagers, that the three digit numbers in front of the dash were numbers which had been played and that the number following the dash showed the amount of money which had been played on the number which preceded the dash.

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1. The information charges: "That on or about the 10th day of October, 1952, at Philadelphia, Victor Calamaro—being a person liable for the payment of Special Occupational Tax imposed by Title 26 U. S. C., Sec. 3290, did accept wagers as defined in Title 26 U. S. C., Sec. 3285, without having previously paid the Special Occupational Tax imposed by Sec. 3290 due and owing to the United States."

Defendant admitted to the officers at the time of his arrest that he had been picking up "numbers" for a period of three months and that for this work he had been paid $40 a week.

The evidence also showed that as a result of the evidence obtained at the time of the arrest on October 10, 1952, defendant was indicted in the Court of Quarter Sessions of Philadelphia County and charged with setting up an illegal lottery. The evidence showed also that defendant pleaded guilty to this charge and was sentenced thereon.

The Revenue Code provides: (Sec. 3285)

"(a) Wagers. There shall be imposed on wagers . . . an excise tax equal to 10 per centum of the amount thereof . . .

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

The Code also provides: (Sec. 3290)

"A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

The Code also provides: (Sec. 3294)

"(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

The numbers gambling business in which defendant was involved was operated by a proprietor or numbers

bank. The proprietor employed numbers writers who made the contacts with the public and who actually sold the numbers and collected the money from the customers. The writers made records of their bets or wagers (the numbers played and the amount of money played thereon) and these records were conveyed to the numbers bank. However, the writers themselves did not bring these records to the numbers bank. This transportation or messenger work was done by other employees of the bank, known as pick-up men. Defendant was one of these pick-up men. The evidence does not show that he himself sold any numbers or handled any money, or that he was a proprietor of the business.

It is clear that the proprietor of the gambling business in which defendant was engaged was liable for a tax of ten per cent on the amount of all the wagers placed with him and that he was liable additionally for the special tax of $50 a year. It also is clear that the numbers writers were liable for the special tax of $50 a year. The question here is whether or not defendant, who did not contact the public and who handled no money was "engaged in receiving wagers for or on behalf of" his employer, the numbers bank.

Defendant contends that he was not "engaged in receiving wagers." I disagree with defendant's contention. In my opinion he was just as much engaged in receiving wagers as were the numbers writers. The numbers writers, of course, actually contacted the customers, took their money and assisted more directly in the making of the bets, but they were no more receiving wagers than was defendant, because they were all working not for themselves, but for their principal and it was the principal in fact who was making the wagers. Both the pick-up men and the numbers writers were assisting in the making and receiving of wagers and therefore all of them were "engaged in receiving wagers for or on behalf of" the numbers bank.

In *Sagonias v. United States*, 223 F. 2d 146 (5th Cir. 1955) a pick-up man made the same contention as defendant is now making in the present case. In the *Sagonias* case the United States Court of Appeals for the Fifth Circuit ruled against the contention which defendant is now making. I agree with this decision.

The numbers slips which were found on the present defendant's person at the time of his arrest were seized by the police officers, but they were not produced at the trial of the case. The government explained the failure to produce the slips by showing that they had been delivered to the Philadelphia Court of Quarter Sessions, and that after defendant had pleaded guilty and had been sentenced in that court the slips had been confiscated [2] by the District Attorney's office. Defendant contends that the slips were the best evidence against him and that because of their absence in the trial of this case he cannot properly be convicted. I disagree with this contention. The government was required to prove only that the slips had existed, that they were numbers slips, and that the defendant had been carrying them. The government had no burden and made no attempt to prove the specific contents of the slips. Consequently, the best evidence rule has no application to the problem presented by the failure to produce the numbers slips in the present case. See IV Wigmore on Evidence, Sec. 1242 (3rd Ed. 1940).[3] *In Re Ko-Ed Tavern*, 129 F. 2d 806 810 (3rd Cir. 1942). The failure to produce the slips affected the weight rather than the competency of the testimony of the policemen. The jury chose to believe the

2. There was no evidence that the slips were lost or destroyed. The evidence showed only that they had been "confiscated."

3. Wigmore states (p. 464); "Thus the [best evidence] rule applies only to the *terms of the document*, and not to any *other facts about* the documents. In other words, the rule applies to exclude testimony designed to establish the *terms* of the document, and requires the document's production instead, but does not apply to exclude testimony which concerns the document without aiming to establish its terms."

policemen and the government's explanation of the absence of the slips, as it had a right to do.

On May 6, 1952, the sections of the Internal Revenue Code involved in the present case were held to be unconstitutional by Judge Welsh of this court. *United States v. Kahringer*, 105 F. Supp. 322. The decision of Judge Welsh was reversed and the constitutionality of the statute was upheld by a decision of the United States Supreme Court dated March 9, 1953. *United States v. Kahringer*, 345 U. S. 22. Defendant was arrested on October 10, 1952. The evidence in the case connects him with an offense on that day and with offenses during the period of three months immediately prior thereto. Consequently, all of defendant's gambling activities occurred between the time of Judge Welsh's decision and its reversal by the Supreme Court. Defendant contends that because his alleged violation of the statute occurred after the time the District Court had declared the statute unconstitutional and before the time this decision was reversed on appeal, he cannot be held guilty of a crime in violation of the statute, particularly since he is being tried for a crime which allegedly was committed in the same district in which the statute had been held unconstitutional by a judge of that district. With this contention I do not agree. Judge Welsh's decision was only that of a court of first instance. It was subject to reversal by an appellate court and indeed the decision had been appealed (the notice of appeal was filed on June 6, 1952) prior to the time when defendant engaged in the gambling activities for which he is now claiming immunity because of Judge Welsh's decision. I agree with the statement of the Supreme Court of the State of Iowa in its opinion in the case of *State v. Striggles*, 210 N. W. 137, 49 A. L. R. 1271, the statement being: (p. 1272)

> "There is no case cited, nor can we find one on diligent search, holding that the decision of an inferior court, can be relied upon to justify the defendant in

> a criminal case in the commission of the act which is alleged to be a crime. We are disposed to hold . . . that when the highest court of jurisdiction passes on any given proposition, all citizens are entitled to rely upon such decision; but we refuse to hold that the decisions of any court below, inferior to the supreme court, are available as a defense under similar circumstances. . . . It is settled law that in prohibitive statutes covering misdemeanors, where no provision is made as to intention, and the word 'knowingly' or other apt words are not employed to indicate that knowledge is the essential element of the crime, intention is not an element of the crime . . . ."

In the present case the problem was one of constitutionality rather than statutory construction, but in my opinion the principle of law expressed by the *Striggles* case applies both when the problem is one of statutory construction and when the problem is one of constitutionality. The effect of a change in statutory construction has been presented to the Pennsylvania courts and the principle of law involved in a change of construction has been stated by the Pennsylvania Supreme and Superior Courts to be: (*Buxadus v. Gen. Cement Prod. Co.*, 159 Pa. Sup. Ct. 501, 504, aff'd. 356 Pa. 349).

> ". . . In general the construction placed upon a statute by the courts becomes a part of the act *from the very beginning*. And when former decisions are overruled, the reconsidered pronouncement becomes the law of the statute from the date of its enactment."[4]

It should be pointed out that the defendant did not take the stand and that he presented no evidence in the

4. There are statements to the same effect in other Pennsylvania cases. See *Phila. v. Schaller*, 148 Pa. Sup. Ct. 276, 280. *Menge v. Phila.*, 30 D. & C. 352, 354. But this all-inclusive statement apparently is not the law in all the states. See Retrospective Operation of Overruling Decisions, 35 Ill. L. R. 121.

present case. There is nothing to indicate that he was in any way misled by Judge Welsh's decision or that he even knew of it, or that he would have paid the tax but for Judge Welsh's decision.

It should be emphasized that since the word "willful" was not used in the information defendant has been indicted and found guilty under Section 3294(a) of the statute by the terms of which knowledge and/or willfulness are of no significance in contrast to Section 3294(c) under which willfulness is an essential element of the crime. Cf. *United States v. Kahringer*, 210 F. 2d 565. (3rd Cir. 1954)

Defendant contends also that there is a variation between the information and the proof that he was charged with having "accepted" wagers while the proof showed that he "received" wagers. Defendant's reasoning is that since the section of the statute which refers to proprietors uses the word "accept" while the section of the statute which refers to employees uses the word "receive", an employee (not a proprietor) can be convicted properly only if he has been charged with having "received" wagers.

The United States Supreme Court has said in reference to the problem of variance in *Berger v. United States*, 295 U. S. 78, at page 82:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

If the word "receive" had been substituted in the information for the word "accept" defendant would have no

argument at all on his contention of variance. The words "receive" and "accept" as they are used in referring to part of a gambling business are so close in meaning that in my opinion, for indictment purposes, the use of one rather than the other in the case is of no significance at this stage of the case, that is, after the trial and the verdict. I cannot see how the use of the one word rather than the other could have taken defendant by surprise or in any way could have interfered with his presentation of his defense. The evidence, read with the information, shows clearly of what the defendant was convicted. He is amply protected against another prosecution for the same offense. See *United States v. Richie*, 222 F. 2d 436 (3rd Cir. 1955). I disagree with defendant's contention that there was a variance between the information and the proof.

Accordingly, defendant's motions for judgment of acquittal and in the alternative for a new trial will be denied.

/s/ ALLAN K. GRIM, *J.*

JUDGMENT.

On this 16th day of January, 1956 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of failure to pay special occupational tax on wagering (Filed January 16, 1956), as charged and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay to the United States a fine of One Thousand Dollars ($1,000.00).

(Seal)

/s Allan K. Grim,
Allan K. Grim,
United States District Judge.

F 729 4-53 1M

DEPARTMENT
BUREAU

POLICE DEPARTMENT
PHILADELPHIA, PA.

9-7
9/26/55
17892 Cr

EXHIBIT G-2

5.26.53 19

In the case of Victor Calamaro vs. Commonwealth, arrested by Officer Kelly of the 33rd. District, charged with Lottery the case was disposed of, the defendant being found Guilty and sentenced to $200.00 F & C. in the _____ by Judge Griffith. The following articles held as evidence in said case were Confiscated by Asst. D. A. Crippins

Articles:

40-slips, 8-sheets

The above articles and merchandise were confiscated by Crippins ASSISTANT DISTRICT ATTORNEY by order of the Court

Judge Griffith

Officer Ed. Kelly 2792 33rd Police District.

CHIEF CLERK, POLICE DEPARTMENT

62a

64 In United States Court of Appeals

for the Third Circuit

No. 11846

UNITED STATES OF AMERICA

v.

VICTOR CALAMARO, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 24, 1956

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed July 11, 1956)

By HASTIE, Circuit Judge. The special occupational tax, recently imposed on gamblers by Section 471 (a) of the Revenue Act of 1951, 65 Stat. 531, and the attendant criminal sanctions are bringing bizarre problems to the national courts. Witness the present appeal, which turns on a question of job classification in the so-called numbers racket.

The legislative scheme makes a person, who engages in a type of gambling activity which is taxable under Section 3290
65 of Title 26 of the United States Code without having paid the tax, guilty of a crime under Section 3294 (a) of that Title. Such a conviction has led to this appeal.

The first question presented is whether the district court erred in not directing an acquittal on the ground that the proved conduct of the accused did not make him liable to the gambler's tax. In terms, Section 3290 imposes a special occupational tax not only on the entrepreneur "who is engaged in the business of accepting wagers" but also on one "who is engaged in receiving wagers for" such an entrepreneur.

The evidence revealed appellant Calamaro as a very minor functionary in the conduct of that illegal type of lottery called the numbers game. It is conceded that he is not "engaged in the business of accepting wagers" within the meaning of the statute.[1]

[1] The correctness of this concession is indicated by the legislative history of the statute. Both Senate and House Reports on the bill state such a limitation on the concept of engaging in the business of accepting wagers.

"A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The 'principals'

But the court below thought Calamaro's activity, as proved, amounted to "receiving wagers" within the meaning of Section 3290. Whether that conclusion is correct must be decided in the light of what the record shows about the organization of this illegal business and the specific role played by appellant.

From the evidence we learn that an operating center for numbers play is called a "bank". Each day the written notations of the many "plays", showing how much each bettor has wagered and upon what number or numbers, are channeled into the bank for recordation and appropriate action. In due season the bank also disburses sums won by the relatively few bettors upon
66 whose illegal chance-taking fortune has smiled. But neither in placing his wager nor in collecting, if he wins, does the bettor visit the "bank" or establish direct contact with the headquarters operation. Rather, he places his wager with one of many scattered field operatives called "writers". We are told that the "writing" procedure is standardized in that the "writer" records each wager in triplicate on standard slips; one for the bettor, a duplicate to be retained by the writer, and a third or action copy, identified by its yellow color, for the bank.

But the writer does not come into personal contact with the bank any more than does the bettor. The "numbers banker", even as bankers and brokers in reputable commerce, employs salaried runners and messengers. These couriers are called "pick-up men." It is the duty of a pick-up man to make a daily round of writers, collect yellow slips from them and carry these items to the bank.

Calamaro was a salaried pick-up man. He was intercepted, apparently inbound on his appointed round, by an alert police officer and found to have on his person tell-tale numbers paraphernalia; to wit, notations of bets recorded on yellow slips, such as already have been described. His conduct became a matter of concern to the federal authorities upon discovery that he was going about his illegal work without having rendered unto Caesar any Section 3290 tribute. Whether that section applied to him as a pick-up man, is the present issue.

In normal usage of familiar language, "receiving wagers" is what someone on the "banking" side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides

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in such transactions are commonly referred to as 'bookmakers.' * * *. H. R. Rep. No. 586, 1951, 82d Cong., 1st Sess. 1783, 1839; S. Rep. No. 781, Id., 1969, 2091.

This restrictive concept has been recognized and applied by the Court of Appeals for the Fourth Circuit in Sagonias v. United States, 1955, 223 F. 2d 146. On the other hand a general instruction, part of which seems to disregard this concept, was approved by the Court of Appeals for the First Circuit in Daley v. United States, 1956, 231 F. 2d 123. However, that case did not involve pick-up men or operatives in any analogous situation and it does not appear that the legislative history was brought to the court's attention.

of a single coin. You can't have one without the other.[2] Before the pick-up man enters the picture, in such a case as we have here, the wager has been received physically by the writer and,
67 in legal contemplation, by the writer's principal as well. The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to "receiving a wager." Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits.

Recognizing this analytical difficulty, the government argues in generality that all who participate on the banking side of the numbers game may be viewed as receiving wagers. But this is an enlargement of the meaning of ordinary language used by Congress beyond ordinary usage and understanding. Certainly, such enlargement is not justified when the matter in issue is the scope of a statutory duty, compliance with which is enforced by a criminal sanction.

In reaching this conclusion we are aware that we are disagreeing with the United States Court of Appeals for the Fifth Circuit which, in Sagonias v. United States, 1955, 223 F. 2d 146, upheld the conviction of a pick-up man in a case indistinguishable from this one. Three sentences in the Sagonias opinion state its rationale:

"* * * [T]he primary purpose of the statute as a whole was to produce revenue by subjecting commercialized gambling to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other em-
68 ployees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation." 223 F. 2d at pp. 147–8.

If we assume that this judicial view of general statutory purpose is correct, to us it still does not seem to follow that language

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[2] Among the definitions in the statute, one which is significant here defines "wager" as "any wager placed in a lottery conducted for profit." 26 Stat. § 3285 (b) (1) (C).

which on its face merely imposes a tax on two categories of gambling personnel can properly be read as implying that all other categories of gambling personnel are also taxable. Ejusdem generis may be appropriate enough as a rule of limitation in construing a conjunctive coupling of specifics with a generality. But we can see no warrant for an enlargement of meaning ejusdem generis in a case like this where the legislature has used no general language to suggest that it was attempting to extend the tax beyond the enumerated categories of acceptors and receivers.

Finally, the Sagonias opinion also cites, as a make-weight, a statement in Section 325.41 of Regulation 132 promulgated November 3, 1951 by the Treasury Department. There the Department lists some examples of types of employment which in its view obligate the worker to pay this tax. One example is employment by an operator of a numbers game "to collect from his agents the wagers received on his behalf." But we think the statutory statement of taxable categories is not ambiguous and not comprehensive enough on its face to make the situation of a pick-up man an apt example of its coverage. To accept the Treasury view would be to add to the statute something which simply is not there.

We conclude that the district court should have granted appellant's motion for acquittal. We have not considered any of appellant's objections to other rulings of the trial court.

The judgment will be reversed.

69 *McLaughlin, Circuit Judge, dissenting.*

In its attempted delicate distinction which carefully removes appellant from the reach of the tax and, in effect, emasculates the statute, the majority ignores the realities of the case.

Admittedly appellant receives the ticket identifying the particular wager from which, according to the testimony, after the winning number has "come out" the bank determines whether it is obligated to pay that particular ticket. What more is needed to "receive a wager" does not appear from the court's decision. Further, instead of appellant being an inconsequential messenger, he is a direct representative of the "banker"; a man from headquarters. Appellant stems directly from the "banker" to the "writers", an indispensable link in the day to day functioning of this vicious operation. With his class now exonerated everyone connected with "numbers" anywhere, if put to it, should have little difficulty avoiding the impact of Section 3290 by simply asserting that he is merely a "pick-up" man.

From the facts, appellant is a necessary and important participant in the ugly corroding racket involved. Not only is he

subject to that part of the law imposing liability on those persons "engaged in receiving wagers" (Sagonias v. United States, 223 F. 2d 146 (5 Cir. 1955)) but he also comes directly under it as one "engaged in the business of accepting wagers". That is the clear holding of Daley v. United States, 231 F. 2d 123, 128 (1 Cir. March 30, 1956). There, the court specifically affirmed that portion of the trial judge's charge which stated that,

"* * * to be 'engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or
70 lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central bookkeeping agency of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business.'"

There are no reported decisions in accord with the majority view. I would affirm the judgment of the district court.

71 In United States Court of Appeals for the Third Circuit

No. 11846

UNITED STATES OF AMERICA

v.

VICTOR CALAMARO, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, KALODNER and HASTIE, Circuit Judges

Judgment

July 11, 1956

[File endorsement omitted.]

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

JULY 11, 1956.

72. [Clerk's certificate to foregoing transcript omitted in printing.]

73 Supreme Court of the United States

No. 304, October Term, 1956

Order allowing certiorari

Filed October 15, 1956

[Title omitted.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR CALAMARO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, which had adjudged petitioner guilty of failure to pay the occupational tax on wagering.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (App., *infra*, pp. 11-18) have not yet been reported. The opinion of the District Court (R. 53-60) is reported at 137 F. Supp. 816.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1956 (App., *infra*, p. 18). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a numbers "pick-up man" is required to pay the special occupational tax imposed by the Internal Revenue Code, 1939, Section 3290.

STATUTE INVOLVED

The Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.), Sections 3285 (a) and (d), 3290 and 3294 (a) provide:

§ 3285. *Tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

* * * * *

(d) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

§ 3290. *Tax.*

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter

A or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 3294. *Penalties.*

(a) *Failure to pay tax.*

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

STATEMENT

Respondent was apprehended by officers of the Philadelphia police department on October 10, 1952 (R. 7). He had in his possession the following paraphernalia of a numbers lottery, as described by the officers: "40 yellow banker slips containing 1200 straight lottery bets and eight sheets of paper containing 600 number straight lottery bets, a total of 1800 number lottery bets" (R. 9, 21). One of the officers, experienced in the numbers type of lottery, testified that in that type of operation the money for a wager is paid by the player to a "writer", who records the wager in triplicate, retaining the white copy for his own record, furnishing the tissue copy to the numbers player, and delivering the yellow copy to the "pick-up man." The pick-up man delivers the yellow copy to the "banker." If the player has the winning number, the banker delivers the required amount to the writer, who in turn pays off the player. (R. 15-16.)

Respondent admitted to the officers that he had been a pick-up man for three months at a salary of $40 per week (R. 13, 21). On October 29, 1952, respondent pleaded guilty in the Court of Quarter Sessions, County

of Philadelphia, to setting up a lottery and was fined $200 and costs (R. 24-29). Upon an information filed in the United States District Court charging respondent with accepting wagers without having paid the special tax imposed by § 3290 of the Internal Revenue Code (R. 3), and upon trial before a jury, respondent was found guilty (R. 51), and fined $1,000 (R. 61).

Respondent moved for acquittal, contending, *inter alia*, that a pick-up man is not a person "engaged in receiving wagers" for the banker (§ 3290, *supra*, pp. 2-3) (R. 55). The trial judge rejected the contention, relying upon the decision of the Fifth Circuit in *Sagonias* v. *United States*, 223 F. 2d 146 (R. 56), and stating (R. 55):

> * * * The numbers writers, of course, actually contacted the customers, took their money and assisted more directly in the making of the bets, but they were no more receiving wagers than was defendant, because they were all working not for themselves, but for their principal and it was the principal in fact who was making the wagers. Both the pick-up men and the numbers writers were assisting in the making and receiving of wagers and therefore all of them were "engaged in receiving wagers for or on behalf of" the numbers bank.

The Court of Appeals reversed. The majority of the court (Hastie and Kalodner, JJ.) specifically recognized that its holding was in conflict with the Fifth Circuit's *Sagonias* decision, but reasoned that the pick-up man receives no wager, but only a record of a wager. Judge McLaughlin dissented from the majority's "attempted delicate distinction" as "ignor[ing] the realities of the case." He held, further, that respondent

was not only "engaged in receiving wagers," but was also "engaged in the business of accepting wagers" under the statute.

REASONS FOR GRANTING THE WRIT

1. Admittedly, the decision below is in direct conflict with the Fifth Circuit's decision in the case of *Sagonias* v. *United States,* 223 F. 2d 146, in which this Court denied certiorari. 350 U. S. 840. It also conflicts in principle with *Daley* v. *United States,* 231 F. 2d 123 (C. A. 1), certiorari denied, 351 U. S. 964, where the defendants, who were arrested in a raid on the headquarters of a gambling business engaged in accepting bets on horse and dog races and numbers pools, were charged with failure to register and to pay the special tax as (paraphrasing the language of § 3285(d), *supra,* p. 2) persons engaged "in the business of accepting wagers and of conducting a lottery and of conducting a wagering pool."[1] In holding that the evidence warranted the jury's finding that each defendant, individually, was engaged in the described business, the First Circuit approved the trial judge's charge that to be "engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central bookkeeping agency

[1] In the case at bar, it was simply charged that respondent was a person liable for the special occupational tax imposed by § 3290, *supra,* pp. 2-3, and that he "did accept wagers" without having paid the tax (R. 3).

of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business" (231 F. 2d at 128). On this theory, which the dissenting judge below thought was applicable here, respondent is guilty on the evidence as one who was himself "engaged in the business of accepting wagers" (§ 3285(d)), within the terms of the information.

2. The distinction drawn by the court below between receipt of a wager and receipt of the record of a wager is, we submit, a refinement unwarranted by either the literal language or the purpose of the statute. Moreover, this interpretation, which narrowly looks only to the last part of § 3290 covering those "engaged in receiving wagers for or on behalf of any person" liable for the special tax, ignores the broad terms of § 3285(d) and therefore unduly restricts the just-quoted agency language of § 3290 which refers to and incorporates the provisions of § 3285(d). The provision of § 3290 for taxing persons "engaged in receiving wagers for or on behalf of" another "person who is engaged in the business of accepting wagers" or "who conducts any wagering pool or lottery" (§ 3285(d)) clearly contemplates the taxing of persons acting as agents for the banker in the conduct of such business. In ordinary parlance, and in the context of this statute, the word "wager" is not used in the sense of the contract alone—the intangible meeting of the minds—but connotes as well the written record of the wager (the numbers slip) which is made by the writer and conveyed to the banker by the pick-up man.[2] True, the writer "receives" the

[2] See the officers' reference at R. 9, 21, to the slips as "containing" the "bets."

wager from the player in the sense that he accepts it, thus binding the principal in a contract. But the writer's activities in his contacts with the players and in making records of the wagers are, as shown by the record, merely routine activities in bringing the banker and the players together. Equally essential in the conduct of the business are the pick-up men who bring to the banker the slips—the wagers, the bets—written by the writers. All these activities are integrated steps in conducting the lottery; all the participants work, not for themselves, but for the banker who is the principal of all of them in making the wagers; each step is essential in the banker's ultimate receipt of the wagers.

Under the distinction made by the court below, liability for the special tax would turn upon a wholly irrelevant fact—of two persons, both necessary to the gambling operation and equally engaged in it, only the first in point of time deals with the player, while the second does not deal with him, but only with the writer and the banker. But it is of no moment that two agents happen to intervene between the player and the banker. There is no inherent obstacle to having more than one person "receive" the wager "for or on behalf of" the banker; the statute does not refer to taking wagers from the bettors but to receiving them on behalf of the banker. The writer "receives" the wager from the player, but the pick-up man as truly "receives" the wager—the numbers slip—this time from the writer, but clearly "on behalf of" the banker. That is sufficient under the statute.

3. The Treasury Department's regulation has, since the enactment of the legislation, provided the compelling weight of a contemporary administrative inter-

pretation. The regulation, which was issued on the effective date of the statute,[3] spells out a detailed example of a typical numbers operation, clearly referring both to the writer taking wagers directly from the players and the employee who collects the slips from the writer. The regulation specifically includes the latter pick-up employee among those liable for the special tax. 26 C.F.R. (1956 Supp.) 325.41.[4]

Significant as well is the fact that in the general revision of the Internal Revenue Code, in 1954, Congress reenacted without change the provisions involved here (I.R.C., 1954, §§ 4401(c), 4411). As the Fifth Circuit said in the *Sagonias* case, *supra*, "Certainly, we cannot assume that the Congress was ignorant of that interpretation [of the Treasury Department]; on the contrary, we must presume that reenactment of the same wording was deliberate and with full knowledge of the published regulation" (223 F. 2d at 148). Cf. *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Commissioner* v. *Flowers*, 326 U.S. 465, 469; *Helvering* v. *Griffiths*, 318 U.S. 371, 395.

The committee reports on the original bill likewise manifest the purpose of Congress to reach, through the special tax and registration provisions, all persons who participate in the steps involved in consummating

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[3] The effective date of the statute was November 1, 1951 (65 Stat. 531). The regulation was issued on the same date (16 F.R. 11211, 11218).

[4] "B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

"B, his ten agents, *and the employee who collects the wagers* received on his behalf are each liable for the special tax." [Emphasis added.]

wagering transactions. The reports observe that "Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners' ", and state in substantially identical language (H. Rep. No. 586, 82d Cong., 1st sess., p. 60; S. Rep. No. 781, 82d Cong., 1st sess., p. 118 (1951)):

> The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the *tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved.* For this reason, the bill(s) provide(s) that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers. [Emphasis added].

The "tracing" of numbers bets through "the various steps involved" includes the activities of pick-up men.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys.

AUGUST 1956.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,846

UNITED STATES OF AMERICA

v.

VICTOR CALAMARO, APPELLANT

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued May 24, 1956

Before McLAUGHLIN, KALODNER and HASTIE, Circuit Judges

OPINION OF THE COURT—Filed July 11, 1956

By HASTIE, *Circuit Judge:*

The special occupational tax, recently imposed on gamblers by Section 471 (a) of the Revenue Act of 1951, 65 Stat. 531, and the attendant criminal sanctions are bringing bizarre problems to the national courts. Witness the present appeal, which turns on a question of job classification in the so-called numbers racket.

The legislative scheme makes a person, who engages in a type of gambling activity which is taxable under Section 3290 of Title 26 of the United States Code without having paid the tax, guilty of a crime under Section 3294 (a) of that Title. Such a conviction has led to this appeal.

The first question presented is whether the district court erred in not directing an acquittal on the ground

that the proved conduct of the accused did not make him liable to the gambler's tax. In terms, Section 3290 imposes a special occupational tax not only on the entrepreneur "who is engaged in the business of accepting wagers" but also on one "who is engaged in receiving wagers for" such an entrepreneur.

The evidence revealed appellant Calamaro as a very minor functionary in the conduct of that illegal type of lottery called the numbers game. It is conceded that he is not "engaged in the business of accepting wagers" within the meaning of the statute.[1] But the court below thought Calamaro's activity, as proved, amounted to "receiving wagers" within the meaning of Section 3290. Whether that conclusion is correct must be decided in the light of what the record shows about the organization of this illegal business and the specific role played by appellant.

From the evidence we learn that an operating center for numbers play is called a "bank". Each day the written notations of the many "plays", showing how

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[1] The correctness of this concession is indicated by the legislative history of the statute. Both Senate and House Reports on the bill state such a limitation on the concept of engaging in the business of accepting wagers.

> "A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The 'principals' in such transactions are commonly referred to as 'bookmakers', . . ." H. R. REP. No. 586, 1951, 82d Cong., 1st Sess. 1783, 1839; S. REP. No. 781, *Id.* 1969, 2091.

This restrictive concept has been recognized and applied by the Court of Appeals for the Fourth Circuit in *Sagonias v. United States*, 1955, 223 F.2d 146. On the other hand a general instruction, part of which seems to disregard this concept, was approved by the Court of Appeals for the First Circuit in *Daley v. United States*, 1956, 231 F.2d 123. However, that case did not involve pick-up men or operatives in any analogous situation and it does not appear that the legislative history was brought to the court's attention.

much each bettor has wagered and upon what number or numbers, are channeled into the bank for recordation and appropriate action. In due season the bank also disburses sums won by the relatively few bettors upon whose illegal chance-taking fortune has smiled. But neither in placing his wager nor in collecting, if he wins, does the bettor visit the "bank" or establish direct contact with the headquarters operation. Rather, he places his wager with one of many scattered field operatives called "writers". We are told that the "writing" procedure is standardized in that the "writer" records each wager in triplicate on standard slips; one for the bettor, a duplicate to be retained by the writer, and a third or action copy, identified by its yellow color, for the bank.

But the writer does not come into personal contact with the bank any more than does the bettor. The "numbers banker", even as bankers and brokers in reputable commerce, employs salaried runners and messengers. These couriers are called "pick-up men." It is the duty of a pick-up man to make a daily round of writers, collect yellow slips from them and carry these items to the bank.

Calamaro was a salaried pick-up man. He was intercepted, apparently inbound on his appointed round, by an alert police officer an found to have on his person tell-tale numbers paraphernalia; to wit, notations of bets recorded on yellow slips, such as already have been described. His conduct became a matter of concern to the federal authorities upon discovery that he was going about his illegal work without having rendered unto Caesar any Section 3290 tribute. Whether that section applied to him as a pick-up man, is the present issue.

In normal usage of familiar language, "receiving wagers" is what someone on the "banking" side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other.[2] Before the pick-up man enters the picture, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well. The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to "receiving a wager." Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits.

Recognizing this analytical difficulty, the government argues in generality that all who participate on the banking side of the numbers game may be viewed as receiving wagers. But this is an enlargement of the meaning of ordinary language used by Congress beyond ordinary usage and understanding. Certainly, such enlargement is not justified when the matter in issue is the scope of a statutory duty, compliance with which is enforced by a criminal sanction.

In reaching this conclusion we are aware that we are

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[2] Among the definitions in the statute, one which is significant here defines "wager" as "any wager placed in a lottery conducted for profit." 26 STAT. § 3285(b)(1)(C).

disagreeing with the United States Court of Appeals for the Fifth Circuit which, in *Sagonias v. United States*, 1955, 223 F.2d 146, upheld the conviction of a pick-up man in a case indistinguishable from this one. Three sentences in the *Sagonias* opinion state its rationale:

> ". . . [T]he primary purpose of the statute as a whole was to produce revenue by subjecting commercialized gambling to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation." 223 F.2d at pp. 147-8.

If we assume that this judicial view of general statutory purpose is correct, to us it still does not seem to follow that language which on its face merely imposes a tax on two categories of gambling personnel can properly be read as implying that all other categories of gambling personnel are also taxable. *Ejusdem generis* may be appropriate enough as a rule of limitation in construing a conjunctive coupling of specifics with a generality. But we can see no warrant for an enlargement of meaning *ejusdem generis* in a case like this where the legislature has used no general language to suggest that it was attempting to extend the tax beyond the enumerated categories of acceptors and receivers.

Finally, the *Sagonias* opinion also cites, as a make-weight, a statement in Section 325.41 of Regulation 132 promulgated November 3, 1951 by the Treasury Department. There the Department lists some examples of types of employment which in its view obligate the worker to pay this tax. One example is employment by an operator of a numbers game "to collect from his agents the wagers received on his behalf." But we think the statutory statement of taxable categories is not ambiguous and not comprehensive enough on its face to make the situation of a pick-up man an apt example of its coverage. To accept the Treasury view would be to add to the statute something which simply is not there.

We conclude that the district court should have granted appellant's motion for acquittal. We have not considered any of appellant's objections to other rulings of the trial court.

The judgment will be reversed.

McLAUGHLIN, *Circuit Judge,* dissenting.

In its attempted delicate distinction which carefully removes appellant from the reach of the tax and, in effect, emasculates the statute, the majority ignores the realities of the case.

Admittedly appellant receives the ticket identifying the particular wager from which, according to the testimony, after the winning number has "come out" the bank determines whether it is obligated to pay that particular ticket. What more is needed to "receive a wager" does not appear from the court's decision. Further, instead of appellant being an inconsequential messenger, he is a direct representative of the

"banker", a man from headquarters. Appellant stems directly from the "banker" to the "writers", an indispensable link in the day to day functioning of this vicious operation. With his class now exonerated everyone connected with "numbers" anywhere, if put to it, should have little difficulty avoiding the impact of Section 3290 by simply asserting that he is merely a "pick-up" man.

From the facts, appellant is a necessary and important participant in the ugly corroding racket involved. Not only is he subject to that part of the law imposing liability on those persons "engaged in receiving wagers" (Sagonias v. United States, 223 F.2d 146 (5 Cir. 1955)) but he also comes directly under it as one "engaged in the business of accepting wagers". That is the clear holding of Daley v. United States, 231 F.2d 123, 128 (1 Cir. March 30, 1956). There, the court specifically affirmed that portion of the trial judge's charge which stated that,

> "* * * to be 'engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central bookkeeping agency of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business.'"

There are no reported decisions in accord with the majority view. I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,846

UNITED STATES OF AMERICA

vs.

VICTOR CALAMARO, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: MCLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk.

July 11, 1956.

Received & Filed July 11, 1956.

IDA O. CRESKOFF,
Clerk.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 304

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR CALAMARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 64–68) are reported at 236 F. 2d 182. The opinion of the District Court (R. 53–60) is reported at 137 F. Supp. 816.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1956 (R. 68). The petition for a writ of certiorari was filed on August 9, 1956, and was granted on October 15, 1956 (R. 69). The jurisdiction of the Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a numbers "pick-up man" is required to pay the special occupational tax imposed by the In-

ternal Revenue Code, 1939, Section 3290, on a person "who is engaged in receiving wagers for or on behalf of" any person liable for the wagering tax.

STATUTE INVOLVED

The pertinent provisions of chapter 27A (Wagering Taxes) of the Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.) provide:

Subchapter A—Tax on Wagers

§ 3285. *Tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*

For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers-game, policy and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101; if no part of the

net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) *Amount of wager.*

In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * * * *

Subchapter B—Occupational Tax

§ 3290. *Tax.*

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 3291. *Registration.*

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

* * * * *

§ 3294. *Penalties.*

(a) *Failure to pay tax.*

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * * * *

STATEMENT

An information filed in the United States District Court for the Eastern District of Pennsylvania, on July 28, 1954, charged respondent with accepting wagers without having paid the special occupational

tax imposed by Section 3290 of the Internal Revenue Code[1] (R. 1, 3). After a trial by jury, respondent was found guilty (R. 51) and sentenced to pay a fine of $1,000 (R. 61).

At the trial, the following facts were proved:

Respondent was apprehended by officers of the Philadelphia police department on October 10, 1952 (R. 7). He had in his possession the following paraphernalia of a numbers lottery, as described by the officers: "40 yellow banker slips containing 1200 straight lottery bets and eight sheets of paper containing 600 number straight lottery bets, a total of 1800 number lottery bets" (R. 9, 21). Respondent admitted to the officers that he had been "picking up these numbers" for about three months at a salary of $40 per week (R. 13, 21).

One of the officers, experienced in the numbers type of lottery, testified that in that type of operation the money for a wager is paid by the player to a "writer", who records the wager in triplicate, retaining the white copy for his own record, furnishing the tissue copy to the numbers player, and delivering the yellow copy to the "pick-up man." The "pick-up man" delivers the yellow copy to the "banker." If the player has the winning number, the "banker" delivers the required amount to the writer, who in turn pays off the player (R. 15–16).

The evidence further showed that, on October 29, 1952, respondent had entered a plea of guilty in the Court of Quarter Sessions, County of Philadelphia, to

[1] Unless otherwise specified, references are to the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed.).

setting up a lottery and had been fined $200 and costs (R. 24–29).

Respondent moved for acquittal, contending, *inter alia,* that a pick-up man is not a person "engaged in receiving wagers" for the banker (Section 3290, *supra,* p. 3) (R. 55). The trial judge rejected the contention, relying upon the decision of the Court of Appeals for the Fifth Circuit in *Sagonias* v. *United States,* 223 F. 2d 146 (R. 56), and stating (R. 55):

> * * * The numbers writers, of course, actually contacted the customers, took their money and assisted more directly in the making of the bets, but they were no more receiving wagers than was defendant, because they were all working not for themselves, but for their principal and it was the principal in fact who was making the wagers. Both the pick-up men and the numbers writers were assisting in the making and receiving of wagers and therefore all of them were "engaged in receiving wagers for or on behalf of" the numbers bank.

The Court of Appeals for the Third Circuit reversed (R. 68). The majority of the court (Hastie and Kalodner, J. J.) specifically recognized that its holding was in conflict with the Fifth Circuit's *Sagonias* decision, but reasoned that the "pick-up man" received no wager, but only a record of a wager (R. 64–67). Judge McLaughlin dissented from the majority's "attempted delicate distinction" as "ignor[ing] the realities of the case." He held, further, that respondent was not only "engaged in receiving wages," but was also "engaged in the business of accepting wagers" under the statute (R. 67–68).

SUMMARY OF ARGUMENT

A numbers "pick-up man," whose duty it is to collect wager slips from a "writer" and pass them on to a "banker", is liable for the wagering occupational tax as one "receiving wagers for and on behalf of" the "banker" within the meaning of Section 3290 of the Internal Revenue Code, *supra*, p. 3. This was the view of the Court of Appeals for the Fifth Circuit in *Sagonias* v. *United States*, 223 F. 2d 146. It has the support of the language, the legislative history, and the administrative interpretation of the statute.

A. The language of the statute speaks of "receiving wagers for or on behalf of any person," *i. e.*, the "banker." Section 3290, *supra*, p. 3. In everyday parlance, both the "writer" and the "pick-up man" fall within the literal meaning of these words for they both perform essential functions toward the "banker's" ultimate receipt of the wager. The court below, in finding that only the "writer" receives wagers, errs in that it treats the statute as though it spoke in terms of "placing" a wager on behalf of the bettor rather than "receiving" a wager on behalf of the "banker." Both the "writer" and the "pick-up man" receive bets on behalf of the "banker."

There is nothing extraordinary about a finding that two or more persons—here, the "writer" and the "pick-up man"—are receiving wagers for or on behalf of another. The word "receive" has other uses than as the equivalent of the technical word "accept" in the contractual sense. "Receive" may be used to

denote the taking of possession of, or the acquisition of a right to control, a thing, or to denote a person or place from which or for which the thing is being transferred, en route to its ultimate resting place. It is in this common sense that the statute speaks of "receiving" wagers. A man who performs the essential function of collecting betting slips, the only tangible evidence upon which a "banker" would pay a bet, is covered by its provision. Similarly, such a "pick-up man" receives "*wagers*" when he receives the numbers slips, the tangible record of the bet.

B. The legislative history of the statute confirms this reading. Congressional committee reports reveal that the occupational tax was conceived as a device for enforcing the ten per cent excise tax imposed on gamblers by Section 3285, *supra*, p. 2. They explain that the registration provisions of the tax (Section 3291, *supra*, p. 3–4) were included so that gambling transactions could be traced through complex business relationships requiring the identification of the various steps involved. It is evident, therefore, that Congress envisaged the liability of the "pick-up man" for registration, which is likewise couched in terms of "receiving wagers" on behalf of another; and it must follow that he is also liable for payment of the tax. Otherwise, the reporting requirements would be of no avail since the activity of the "pick-up man" as a step in the transaction is essential to its tracing.

Moreover, the committee reports expressly observe that "bookmakers' agents" or "runners" receive bets

for principals. Likewise, in the records of the debates on the floor of Congress there are references to the fact that the special tax is imposed on agents generally or on agents, subagents, and runners. These expressions leave little doubt that Congress intended that all agents channeling wagers to the policy operator, whether dubbed as messengers, pick-up men, runners, couriers, or otherwise, are receiving wagers for or on behalf of a principal within the meaning of the statute.

C. An administrative interpretation of the Treasury Department lends further support by specifying, through the use of an illustration of a typical numbers operation, that a pick-up man is liable for the special tax. This regulation should not be disregarded unless it has been shown to be plainly inconsistent with the law. Moreover, after this regulation had been in effect for nearly three years, Congress revised and amended the Internal Revenue Code re-enacting verbatim the provisions dealing with the wagering occupational tax which this regulation interprets. The regulation must therefore be deemed to have received congressional approval.

ARGUMENT

A "PICK-UP MAN" WHO RECEIVES WAGER SLIPS FROM A "WRITER" FOR DELIVERY TO A "BANKER" IS SUBJECT TO THE OCCUPATIONAL TAX ON GAMBLING AS ONE "RECEIVING WAGERS FOR OR ON BEHALF OF" THE BANKER

The provisions of the Internal Revenue Code which impose a wagering tax on professional gamblers are collected in Chapter 27 A of Title 26 of the United

States Code (1952 ed.).[2] Subchapter A is concerned with the 10% excise tax imposed on wagers. Its provisions define and limit the type of gambling transactions covered (subsections 3285 (b) and (d) *supra*, pp. 2–3) and fix the liability for the tax on each person who is "engaged in the business of accepting wagers" or "who conducts any wagering pool or lottery." We think (although the dissenting judge below thought otherwise)[3] that with respect to the numbers game this language imposes *the excise tax* only on the numbers "banker" doing business on his own account.[4] However, the $50 "occupational tax" here involved is applicable not only to the numbers "banker", as principal, but to "any person engaged in receiving wagers for or on [his] behalf." (Section 3290, *supra*, p. 3). The registration provisions require that each person subject to this tax disclose the identity of the person for whom he receives wagers or the persons who receive wagers for him (Section 3291,

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[2] Now Chapter 35 of the Internal Revenue Code of 1954. See 26 U. S. C. 4401–4423.

See also *Daley* v. *United States*, 231 F. 2d 123, 128 (C. A. 1).

[3] This is confirmed by the legislative history of the statute. See H. Rep. No. 586, 82d Cong. 1st Sess. p. 56, and S. Rep. No. 781, 82d Cong. 1st Sess., p. 114 (1951), wherein it is said: "* * * A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account."

See also Section 325.21 of Treasury Regulation 132 (26 C. F. R. 1956 Supp.), which reads in relevant part:

"A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted."

supra, pp. 3–4). It is the contention of the government that this special $50 tax, the constitutionality of which was upheld in *United States* v. *Kahriger*, 345 U. S. 22, and *Lewis* v. *United States*, 348 U. S. 419, is levied upon every person engaged in the occupation of gambling and that a salaried "pick-up man" in the numbers game, whose duty it is to collect bets from a "writer" and pass them on to a "banker", is one "receiving wagers for and on behalf of" the "banker" within the meaning of the statute. This was the view adopted by the Court of Appeals for the Fifth Circuit in *Sagonias* v. *United States*, 223 F. 2d 146. It has the support of the language, the legislative history, and the administrative interpretation of the statute.

A. THE LANGUAGE OF THE STATUTE

The statute imposes the occupational $50 tax upon one "engaged in receiving wagers for or on behalf of any person" who is liable for the special tax, *i. e.*, the "banker." See Section 3290, *supra*, p. 3. The court below, drawing a distinction between a wager and a record of wager, holds that, whereas a "writer" receives the wager, the "pick-up man" receives only the record of the wager and therefore does not come within the literal language of the statute. Such a refinement is, we think, unwarranted by the terms Congress used. As the District Court pointed out (*supra*, p. 6), the wager, the bet, is technically made neither with the "writer" nor the "pick-up man": it is with the principal. From the point of view of the principal, the "banker"—and that is the controlling point of view under this statute—both

the "writer" and the "pick-up man" are receiving the wagers in his behalf.

The error in the opinion below is that it interprets a statute which speaks of "receiving wagers" on behalf of a principal as if the Congress had spoken in terms of the placing of a wager on behalf of the bettor. From the bettor's viewpoint, the bet is *placed* once; the court below employed the same approach to hold that the wager is *received* once on behalf of the banker by the writer, and cannot be received again. True, in this situation, it is the "writer" who collects the funds from the bettor and writes the first record of the bet.[*] But the statute does not refer to receiving funds or wagers *from* the *bettors* but, as pointed out above, to receiving wagers *"for or on behalf of"* the *"banker."* The bet is received initially by the "writer" for the "banker," but it is also received for the "banker" by the "pick-up man" whose activity is equally essential with that of the "writer" in furtherance of the scheme of the lottery.

There is nothing strange in finding that two or more persons are "receiving" wagers for or on behalf of another. In common, everyday usage, the word "receive" is not limited to the equivalent of the technical word "accept" in a contractual sense. It may be used to denote custody, in the sense of a physical taking or a coming into possession as a

[*] It would appear that, with regard to some wagering, it is the practice of the "pick up man" to collect funds from the "writer" and to compile the wagering slips on a "master * * * sheet" before passing them on to the "banker." See *Reynolds* v. *United States*, 225 F. 2d 123, 129 (C. A. 5), certiorari denied, 350 U. S. 914. There is no evidence of this, however, in the present record.

result of delivery or transmission. It may be used in the constructive sense of an acquisition of the right to control or domination. It may be used to denote the place or person from which a thing is transferred en route to an ultimate resting place. For example, bank tellers, messengers, guards, clerks may all receive the same batch of currency on behalf of a bank—en route to the bank's vault—so that each can be said to be receiving the money on behalf of his employer (the bank). Agents or others receiving money or property on behalf of a principal can be guilty of the crime of "receiving stolen property." *Commonwealth* v. *Kronick*, 196 Mass. 286; *Daniels* v. *State*, 212 Miss. 223. In sum, "receiving" like "possession" is a word of many meanings which takes its specific content from its immediate context. *National Safe Deposit Co.* v. *Illinois*, 232 U. S. 58, 67–68.

In the light of the simple language and brevity of the special tax provision involved in the instant case (as well as the legislative history discussed below, *infra*, pp. 15–20), it seems evident that Congress was not concerned with the subtle refinements of legal "offer" and "acceptance" in this overall attempt at regulatory taxation of the many hundreds of gambling transactions operating in transitory fashion and varying ways. In the common, ordinary meaning of words, a "pick-up man" who takes the slips (or even a record thereof) and presumably the money to the principal has "received" the bets *for* the principal.

The decision of this Court in *Francis* v. *United States*, 188 U. S. 375, emphasizes the necessity for

the distinction which we think is determinative here, the distinction between a statute which considers wagers in terms of the person receiving the bet and one which is drawn in terms of the person placing the bet. In the *Francis* case, under a statute prohibiting the transportation in interstate commerce of a paper representing an interest in a lottery, the Court held that the term "represent" as there used meant "represent to the purchaser." 188 U. S. at p. 378. On this basis, the Court held that the carrying of duplicate slips across state lines (by the then equivalent of a "pick-up man") from the "writer" to the "banker" was not a violation of the statute since the slips were not "the purchasers' documents" and did not represent ("stand as the representative of title to") the purchasers' interests. In its discussion, however, the Court recognized both the "writer" and the carrier as "agents of the lottery company," noting that the movements were "internal circulation within the sphere of the lottery company's possession." 188 U. S. at p. 377. Under the statute here involved, as distinguished from that lottery act, the governing factor (as already noted) is not the interest of the purchaser, but the action taken "on behalf of" the principal. The recognition in the *Francis* case that both the "writer" and the "pick-up man" were acting on behalf of the principal thus supports the conclusion that the "pick-up man" is receiving wagers on behalf of the "banker" within the meaning of the present statute.

Furthermore, the "pick-up man" is plainly receiving a "*wager*" when he obtains the numbers slips or records thereof. In normal parlance, and in the

context we have been discussing, the word "wager" is not used in the sense of the contract alone—the intangible agreement—but connotes as well the written record of the bet (the numbers slip) which is made by the "writer" and conveyed to the "pick-up man."[6]

It is significant that the "pick-up man" is an essential part of the process by which the wager is ultimately received by the "banker." He is a man from headquarters, a trusted deputy of a numbers operator, whose performance is all the more vital to the wagering transaction because of the illegal nature of the business. He is in frequent and direct contact with the "banker." He has daily in his possession and under his control and domination the only tangible evidence upon which a wager can be paid. The "banker" therefore depends upon him for the very life of the business. His work, as well as the "writer's," constitutes an integrated step in conducting the lottery; all the participants work, not for themselves, but for the "banker" who is the principal of all of them in making the wagers; each step is essential in the "banker's" ultimate receipt of the bets.[7]

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[6] See the officers' references at R. 9, 21, to the slips as "containing" the "bets."

[7] In this connection, it is particularly important that in the registration provision of the statute, Section 3291, *supra*, pp. 3–4, Congress required reporting by the "banker" of the name and residence "of each person who is engaged in receiving wagers for him [the registrant] or on his behalf", and also if the registrant "is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person." The interrelationship between the tax provisions and the registration provisions is discussed *infra*, pp. 17–18.

B. THE LEGISLATIVE HISTORY

The court below has declined to attach significance to the purpose of the statute, finding the language so specific and limited as to admit of no "enlargement" by reference to congressional purpose or legislative history (R. 66, 67). However, even if the language appeared, in and of itself, to exclude coverage of a "pick-up man" (which we deny, *supra*, pp. 11–15), there would be little justification for a dogmatic adherence to the literal interpretation in the circumstances of this case. When the plain meaning of words used in a statute has led to an absurd or futile result, or even to merely an unreasonable one "plainly at variance with the policy of the legislation as a whole," this Court has looked beyond the words to the legislative purpose, following that purpose rather than the literal words. *United States, et al.* v. *American Trucking Association, Inc., et al.*, 310 U. S. 534, 543; *Armstrong Co.* v. *Nu-Enamel Corporation*, 305 U. S. 315, 332; *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 126; *Williams* v. *United States*, 289 U. S. 553; *Sorrells* v. *United States*, 287 U S. 435, 446; *Smiley* v. *Holm*, 285 U. S. 355; *United States* v. *Ryan*, 284 U. S. 167, 176; *Poporici* v. *Agler*, 280 U. S. 379; *Ozawa* v. *United States*, 260 U. S. 178, 194; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 14.

Here, the interpretation of the court below gives rise to an unrealistic situation which is inconsistent with the objective of Congress. With respect to a single wagering transaction, it subjects to the $50 occupational tax a bookmaker and one of his agents who collects and channels funds and the record thereof to him. It exempts from the tax a second agent who

likewise channels the bet and its record to the bookmaker. It makes liability for the tax turn upon the wholly irrelevant factor of personal contact with a bettor. The result is a curious one—clearly at variance with the policy of the provisions, which, although passed as revenue raising measures, were in part motivated by a congressional desire to suppress wagering. *United States* v. *Kahriger*, 345 U. S. 22, 27.

The wagering tax provisions became law on November 1, 1951, as Section 471 (a) of the Revenue Act of 1951 (65 Stat. 531). With a view to covering 90 per cent or more of the multi-billion dollar business of professional gambling, Congress hoped to raise at least $400,000,000 in additional revenue annually. See 97 Cong. Rec. 6896; H. Rep. No. 586, 82d Cong. 1st Sess. pp. 54–55; S. Rep. No. 781, 82d Cong., 1st Sess., pp. 112–113 (1951).

The $50 occupational tax (Section 3290) was conceived as a device for effective enforcement of the ten per cent excise tax imposed on wagers by Section 3285. With respect to the registration requirements of the occupational tax (Section 3291),* the commit-

* 26 U. S. C. 3291 (*supra*, pp. 3–4) reads in part:

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

* * * * *

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

tee reports state in substantially identical language (H. Rep. No. 586, 82d Cong., 1st Sess., p. 60; S. Rep. No. 781, 82d Cong., 1st Sess., p. 118 (1951):

> The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the *tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved.* For this reason, the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers. [Emphasis added.]

The identity of the "pick-up man" is essential to the "tracing" of the gambling transaction through the various steps referred to by the committees. It is evident, therefore, that it was the Congressional understanding that the identity of the "pick-up man" would be disclosed under the provisions of Section 3291 requiring the principal to report the name and address of each person "engaged in receiving wagers for him or on his behalf," and that the "pick-up man", in turn, would be subject to the reporting requirements. To argue that the "pick-up man" does not "receive" wagers is to concede that he is outside the reporting requirements which thereby become substantially useless to enforcement. This is clearly at odds with the expressed purpose of the legislation as advanced by the committees.

There are further references in the legislative history which confirm the fact that it was the intention of Congress to subject to the occupational tax, as a means of enforcing the more important wagering tax, all agents of the lottery "banker" who channel the bets to the "bank". In discussing generally the wagering tax, the committee reports[9] observe, "Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners'."[10] On the floor of the House, Representative Reed of New York stated (97 Cong. Rec. 6896): "The bill [H. R. 4473] places a ten percent tax on bets, principally those made with bookmakers and lottery operators, and imposes a $50 a year occupational tax on such professional gamblers and their agents." Senator Kefauver said on the floor of the Senate (97 Cong. Rec. 12231–12232):

> The bill also provides for an occupational tax of $50 for each person who is engaged in wagering. That means that any person who is operating a lottery or any person who is engaged in the numbers business or who may be an agent operating for someone else, will have to pay an occupational tax of $50 in order to carry on his business. * * *
>
> * * * Under this proposal, bookmakers and the numbers operators, their *agents and run-*

[9] H. Rep. No. 586, *supra*, p. 56; S. Rep. No. 781, *supra*, p. 114.

[10] In this connection, it should be noted that the opinion of the court below states (R. 65): "The 'numbers banker,' even as bankers and brokers in reputable commerce, employs salaried *runners* and messengers. These couriers are called 'pick-up men'." [Emphasis added.]

> *ners* would register with the Internal Revenue Bureau and pay an occupational tax of $50 a year. As part of his registration, a professional gambler would have to identify those persons received wagers on his behalf and in addition disclose the identity of those persons for whom he may be acting as agent. * * * It [enforcement] may involve tracing hundreds of transactions through dummy corporations, *agents, subagents, and runners,* and penetrating the hundreds of artful devices to conceal the identity of those liable for payment. [Emphasis added.]

These statements leave little doubt that Congress intended that all agents engaging in wagering for the prime operator, whether dubbed as messengers, pick-up men, runners, couriers, or otherwise, should register and pay the occupational tax.

C. THE ADMINISTRATIVE INTERPRETATION

The decision of the Court of Appeals also fails to accord proper weight to the administrative interpretation of Section 3290. The controlling regulation is Treasury Regulation 132 (26 C. F. R. 1956 Supp.) which was issued on November 1, 1951 (16 F. R. 11211, 11218), the effective date of the statute (65 Stat. 531). Section 325.41 of the regulation, by the use of examples of typical wagering transactions, specifies the persons who are liable for the $50 occupational tax. One example reads as follows:

> B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive

wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

B, his ten agents, *and the employee who collects the wagers received on his behalf* are each liable for the special tax. [Emphasis added.]

This Court has consistently held that such a regulation should not be disregarded or annulled unless plainly and palpably inconsistent with the law, and that the burden is upon the party claiming invalidity to show that the regulation is invalid. *Boske* v. *Comingore*, 177 U. S. 459, 470; *Brewster* v. *Gage*, 280 U. S. 327, 336; *United States* v. *Kirby Lumber Company*, 284 U. S. 1, 3; *Fawcus Machine Company* v. *United States*, 282 U. S. 375, 378; *Commissioner* v. *Wheeler*, 324 U. S. 542, 547.

Moreover, it is significant that in 1954, when this regulation had been in effect for nearly three years, Congress revised and amended the Internal Revenue Code, reenacting verbatim the provisions of Section 3290 as Section 4411 of the new Code (26 U. S. C.). The regulation therefore has the additional support of the doctrine that re-enactment of a statute without disapproval of regulations thereunder gives added sanction (*Commissioner* v. *Wheeler, supra,* at p. 547, fn. 10). It is an established principle that regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval. *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 53; *Helvering* v. *Winmill*, 305 U. S. 79, 83; cf. *Commissioner* v. *Flowers*, 326 U. S. 465, 469; *Helvering* v. *Griffiths*, 318 U. S.

371, 395; *Sagonias* v. *United States*, 223 F. 2d 146, 148 (C. A. 5).

As the Court of Appeals for the Fifth Circuit said in the *Sagonias* case, *supra* (223 F. 2d at 148):

> We think it significant that the Congress saw no necessity to change or clarify the wording of the statute in the light of its interpretation by the Treasury Department. Certainly, we cannot assume that the Congress was ignorant of that interpretation; on the contrary, we must presume that reenactment of the same wording was deliberate and with full knowledge of the published regulation. We are, therefore, of the opinion that appellant was within the class of persons intended to be taxed by Section 3290.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the Court of Appeals should be reversed.

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NOVEMBER 1956.

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 304.

UNITED STATES OF AMERICA,
Petitioner,

v.

VICTOR CALAMARO.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S ANSWER.

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IN THE

Supreme Court of the United States.

October Term, 1956.

No. 304.

UNITED STATES OF AMERICA,
Petitioner,

v.

VICTOR CALAMARO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S ANSWER.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Court:

The petition fairly states the question of law involved in this case (p. 2) and the facts set forth therein (pp. 3-5) sufficiently indicate the manner in which the question arises.

We believe that the decision of the court below is correct and will so contend in the event that this Court issues its writ of certiorari. However, we agree that the decision below is in conflict with that of the Fifth Circuit in the case of *Sagonias v. United States*, 223 F. 2d 146, certiorari denied, 350 U. S. 840. We must also concede that the ques-

tion of law involved is important in the administration of the Wagering Tax Statute (Internal Revenue Code of 1939, 26 U. S. C., 1952 ed., Sections 3285 et seq.).

Therefore, although we do not join in asking this Court to grant certiorari, we do not oppose the petition.

Respectfully submitted,

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September 6, 1956.

IN THE

Supreme Court of the United States

October Term, 1956.

No. 304.

UNITED STATES OF AMERICA,
Petitioner,

v.

VICTOR CALAMARO.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 304.

UNITED STATES OF AMERICA,
Petitioner,

v.

VICTOR CALAMARO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTION PRESENTED.

Whether a salaried "pick-up man", who has no contact with any person placing a wager in a numbers lottery and handles no money, "is engaged in receiving wagers for or on behalf of" the "banker" who operates the lottery within the meaning of Section 3290 of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED.

In addition to those parts of Chapter 27A of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.) which are set forth in the Government's Brief, pp. 2-4, the following provision is pertinent:

SUBCHAPTER A—TAX ON WAGERS.

* * *

§ 3286. CREDITS AND REFUNDS.

* * *

(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit

against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under the subchapter on the original wager as the amount so laid off bears to the amount of the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest shall be allowed with respect to any amount so credited or refunded.

The regulation applicable to the tax on wagers is Treasury Regulation 132 (26 C. F. R., 1956 supp.); the pertinent provisions thereof are as follows:

SUBPART C—EXCISE TAX ON WAGERING.

* * *

§ 325.21. SCOPE OF TAX.

* * *

(b) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted . . .

* * *

§ 325.24. Person liable for tax.—(a) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax [the 10% excise tax imposed by section 3285 of the Code] on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering pool or lottery physically receive the wager or contribution. Any wager or contribution

received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.

* * *

§ 325.25: When tax attaches.—(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor. In the case of a wager on credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor.

* * *

§ 325.32. Records.—(a) In general.—(1) Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, . . . such records as will clearly show as to each day's operation:

* * *

(C) Separately, the gross amount of wagers—

(i) accepted directly by the taxpayer or at any registered place of business of the taxpayer (other than laid-off wagers),

(ii) accepted for his account by agents at any place other than a registered place of business of the taxpayer (other than laid-off wagers), and

(iii) accepted as laid-off wagers from persons subject to the excise tax;

* * *

(2) If a taxpayer has any agents or employees receiving wagers on his behalf, he shall maintain a separate record showing the name and address of each agent or employee, the period of employment, and the number of the special tax stamp issued to each such agent or employee.

* * *

OCCUPATIONAL TAX—WAGERING.

* * *

§ 325.41. Persons liable for tax.—Every person who is liable for the 10 percent excise tax imposed on wagers by section 3285 of the Internal Revenue Code and every person who is engaged in receiving wagers for or on behalf of any other person so liable is liable for the special tax.

Example (1).—A person is engaged in the business of accepting horse race bets. He employs ten persons to receive on his behalf wagers which are transmitted by telephone. He also employs a secretary and bookkeeper.

A and each of the ten persons who receive wagers by telephone are liable for the special tax. The secretary and bookkeeper are not liable unless they also receive wagers for A.

Example (2).—B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

B, his ten agents, and the employee who collects the wagers received on his behalf are each liable for the special tax.

* * * *

§ 325.51. Records of agent or employee.—Every person who is engaged in receiving wagers of a type described in section 325.21 for or on behalf of another person (at any place other than a registered place of business of such other person), shall keep a record showing for each day (1) the gross amount of such wagers received by him, (2) the amount, if any, retained as a commission or as compensation for receiv-

ing such wagers, and (3) the amount turned over to the person on whose behalf the wagers were received, and the name and address of such person. The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the wager was received.

STATEMENT OF THE CASE.

In order to determine whether Section 3290 of the Internal Revenue Code of 1939[1] requires the payment of the special occupational tax by respondent, it is necessary to examine the manner in which a numbers lottery is conducted. The evidence produced at respondent's trial indicates the following (R. 15-16):

A wager in a numbers lottery is called a "play", and the person placing the wager is known as a "player". The operator of the lottery—the one to whom the profits from the operation belong and who controls the set up—is commonly referred to as the "banker" and his place of operation as the "bank". Among those employed by the banker are the "writer" and the "pick-up man". Wagers are made generally on three digit numbers. The banker may employ various systems for determining the winning number; among those in use are the daily reports of wagering at race tracks and the daily reports of the United States Treasury Department.

The player does not come into contact with the bank or banker either in placing his wager or in collecting his winings. Instead, he is visited by or meets a writer to whom he gives his play and the amount of money which he desires to risk thereon. The writer makes a record of the play in triplicate, using white, yellow and tissue slips. In the upper right-hand corner of the slip there is a code symbol

1. All statutory references are to the Internal Revenue Code of 1939, Title 26, U. S. C. (1952 ed.) unless otherwise indicated.

by means of which the banker may identify the writer who received the wager. The tissue slip is given to the player, and the white slip is retained by the writer. The yellow slip is sent to the bank, and it is at this point that the pick-up man enters the picture. Each day the pick-up man contacts the writers employed by the banker, collects the yellow slips, and brings them to the bank. There is no evidence that the pick-up man also collects the money which was received by each writer from the players. When the winning number has been determined, the banker delivers to each writer sufficient money to enable the latter to make the required payments to the winning players; there is nothing in the record to indicate that the pick-up man takes any part in this phase of the operation.

Respondent was a salaried pick-up man. He was arrested on October 10, 1952 in Philadelphia by officers of the Philadelphia Police Department who found on his person yellow bankers slips and sheets of paper containing notations of 1800 number plays (R. 7, 9, 21). At the time of his arrest, respondent told the police officers that he had been picking up numbers slips for about three months and was paid a salary of $40 per week (R. 13, 21).

Respondent was indicted in the Court of Quarter Sessions of Philadelphia County. The indictment contained multiple charges, including setting up a lottery, both public and private, and being concerned in the carrying on of a lottery both public and private; respondent pleaded guilty generally to the charges and was fined (R. 23-29).

Thereafter an information was filed against respondent in the United States District Court for the Eastern District of Pennsylvania, charging that he accepted wagers without having paid the special occupational tax imposed by Section 3290 (R. 1, 3). Respondent was found guilty by a jury, his timely motions for judgment of acquittal and for a new trial were denied, and he was sentenced to pay a fine of $1,000 (R. 51-61).

On appeal to the Court of Appeals for the Third Circuit, respondent contended, among other things, that as a pick-up man he was not "engaged in receiving wagers for or on behalf of" a numbers banker within the meaning of Section 3290. The court (one judge dissenting) accepted this contention, concluded that the trial court had erred in denying respondent's motion for acquittal, and reversed the judgment of the trial court (R. 64-68).[2]

SUMMARY OF ARGUMENT.

Since November 1, 1951, the Federal Government has levied two types of taxes on gambling and certain of the persons engaged therein. One, a 10% excise tax on the gross amount of wagers, must be paid by each person "who is engaged in the business of accepting wagers" or "who conducts a wagering pool or lottery" for profit. Section 3285. The other, a $50 special occupational tax, must be paid by all those liable for the excise tax and by each person "who is engaged in receiving wagers for or on behalf of" anyone liable for the excise tax. Section 3290. This case involves an attempt by the Government to subject respondent to the criminal penalty imposed by Section 3294(a) because of his failure to pay the occupational tax.

1. A salaried pick-up man, such as respondent, is not covered by the plain meaning of the language of Section 3290. Respondent had no stake in the wagers placed in the numbers lottery and did not assume the risk of profit and loss involved therein. He was not liable, therefore, for the 10% excise tax since that tax applies only to those engaged in accepting wagers or conducting wagering pools as principals. The Government concedes this much. If, therefore, a pick-up man is to be subject to the occupational tax, it can only be because he "is engaged in receiving wagers for

2. Because of this conclusion, the majority of the court did not pass upon the other questions raised in respondent's appeal.

or on behalf of" the one who operates the lottery as a principal, i.e., the banker.

The key words in the phrase quoted above are "receiving wagers". They must be considered together for it is not enough that a person receive something used in the operation of the numbers lottery; he must receive a wager to be liable for the occupational tax. The wager is a transaction by which the player risks money on a particular number. This transaction he enters into with the numbers writer who is acting for and on behalf of the banker. At this point the wager has been completed and it has been received. The pick-up man takes no part in this transaction. The pick-up man is concerned only with the internal record keeping operations of the numbers bank, and he receives not wagers but records thereof.

When Congress used the words "receiving wagers" it had in mind only those with whom the wager was placed, i.e., the numbers writer. This is clearly indicated by the definition of wagers contained in Section 3285(b)(1). Hence, a pick-up man does not come within the terms of Section 3290 merely because he is a banker's agent. The agency involved must be of a specific character, namely, one in which the agent acts for the banker in the transaction which results in the placing of a wager.

In interpreting the term "receiving wagers" one must look first to the normal, literal meaning of the words. That meaning can hardly be said to embrace one who, like the pick-up man, plays no part in the making of a wager. To reach the contrary conclusion, one must indulge in the pretense that the wager is received by the numbers writer, is received again by the pick-up man, and is received possibly many more times by other employees of the numbers bank. Such stretching of the meaning of words cannot be justified in the interpretation of a taxing statute, the violations of which are subject to criminal sanctions.

2. The legislative history indicates that Congress did not intend to impose the occupational tax upon a pick-up man. The statute was enacted and its constitutionality sustained as a revenue raising measure. The excise tax on gross wagers was the device employed as the chief means of producing revenue. The occupational tax was conceived to facilitate the collection and enforcement of the excise tax. Neither tax was aimed primarily at the regulation or suppression of illegal gambling. Therefore, their application was confined to two well defined classes rather than to all those who were in some way or another part of a gambling operation. It is against this legislative background that the coverage of the occupational tax must be considered.

There are references in the Congressional committee reports which indicate that Congress considered the placing of wagers and the receiving of wagers as opposite sides of the same coin. One, therefore, cannot occur without the other. Hence, the numbers writer who acts on behalf of the banker in the transaction in which the wager is placed rather than the pick-up man is the one at whom the statutory term "receiving wagers" is directed.

The exclusion of the pick-up man from the coverage of the occupational tax is perfectly compatible with the registration provisions of the statute which are contained in Section 3291. Those provisions command the registration of the numbers banker and of those "engaged in receiving wagers for or on behalf of" the banker. The registration provisions were also designed to aid in the collection of the excise tax. The registration of the banker and his revelation of the writers who work for him, and the registration of the writer and his identification of the banker for whom he receives wagers furnish all of the information necessary to keep track of a numbers lottery and the gross amount of wagers placed therein. There was no necessity, therefore, for Congress to impose the occupational tax on the pick-up man or to compel his registration.

3. The Treasury Regulation which purports to include a pick-up man among those liable for the occupational tax is not controlling. The Treasury's interpretation cannot be supported either by the plain meaning of the statutory language or by any reference to Congressional purpose. Moreover, this interpretation is inconsistent with the Treasury's interpretation of other parts of the statute. The verbatim reenactment of the statute by Congress after the promulugation of the regulation is meaningless because there is nothing to indicate that the attention of Congress was focused upon the problem with which the regulation deals.

ARGUMENT.

1. A Salaried Pick-Up Man, Such as Respondent, Is Not Covered by the Plain Meaning of the Language of Section 3290.

Section 471a of the Revenue Act of 1951, 65 Stat. 531, created two new taxes which became part of the Internal Revenue Code of 1939 as Sections 3285-3294. One of these taxes is the excise tax on gross wagers which, by the terms of Section 3285, must be paid by "each person who is engaged in the business of accepting wagers" and "each person who conducts any wagering pool or lottery" for profit. A wager is defined in Section 3285(b) and includes a wager made as part of a numbers lottery. Section 3286 provides for certain refunds of and credits against the excise tax.

The Government concedes that with respect to a numbers lottery the statute imposes the excise tax only on the banker and not upon the writer, pick-up man or any other employee of the banker. The propriety of this concession is readily apparent. Only the banker assumes the risk of profit or loss involved in operating the lottery, and the excise tax is obviously designed to fall upon only those who have a proprietary stake in the venture. A reading of the entire statute points clearly to this conclusion, and the legislative history explicitly confirms it.[3] In Regulation 132, Sections 325.21 and 325.24(a) the Treasury accepted this interpretation, and in *Sagonias v. United States*, 223 F. 2d 146, 147 (5 Cir.), cert. denied, 350 U. S. 840, the court

3. H. R. Rep. No. 586, 82d Cong., 1st Sess. 1951 (1951 U. S. Code Cong. & Admin. Serv., Vol. 2, p. 1841) and Sen. Rep. No. 871, 82d Cong., 1st Sess. 1951 (1951 U. S. Code Cong. & Admin. Serv., Vol. 2, p. 2093) where the following appears: "Liability for the wagering tax [the excise tax imposed by Section 3285] is placed upon the person who is engaged in the business of accepting wagers or who conducts the pool or lottery. Thus, the tax is to be collected from the bookmaker proper or from the person who conducts the pool or lottery as the principal. . . ."

held that liability for the excise tax in connection with the operation of a numbers lottery was limited to the banker.[4]

The second tax created by the Revenue Act of 1951—and the one involved in this case—is the $50 occupational tax which by the terms of Section 3290 must be paid by each person liable for the excise tax and by each person "engaged in receiving wagers for or on behalf of" any person liable for the excise tax. As the principal in a numbers lottery, the banker is subject to the occupational tax because of his liability for the excise tax. Since a pick-up man is not a principal in the lottery, he is subject to the occupational tax only if he is "engaged in receiving wagers for or on behalf of" the banker. We submit that the pick-up man is not so engaged, and that it is only the writer who "receives wagers" for the banker.

The key words in Section 3290 are "receiving wagers". These words must be considered together and nothing is to be gained by focusing, as the Government does (Brief, pp. 7-8), upon the word "receive" alone and the various uses to which it may be put. In interpreting Section 3290, the important thing is that it requires the receipt of "wagers". The receipt of something other than wagers is not enough to subject the recipient to the occupational tax. A wager is a transaction between the numbers player and the bank by means of which the former risks a certain amount of money on a particular number. The player enters into this transaction through the medium of the writer who participates therein on behalf of the bank and the banker. When the player has handed his money over to the writer and gets from him the tissue slip, the wagering transaction is completed, and both the player and the banker are committed. It follows that at this point the wager has been received on behalf of the banker, and it is the writer who has done the receiving.

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4. The dissenting judge in the court below, relying upon a dictum in *Daley v. United States*, 231 F. 2d 123, 128 (1 Cir.), stated that not only was a pick-up man "engaged in receiving wagers" but he was also "engaged in the business of accepting wagers" (R. 67-68).

The pick-up man takes no part in the transaction described above. All of his functions are performed subsequent to the placing of the wager by the player and after the receipt thereof by the writer. He does nothing more than collect certain records from the writer for delivery to the bank.[5] What he does on behalf of the banker is in no way connected with the wager as such. The pick-up man's services could be dispensed with without affecting the basic wagering transaction. In reality, a pick-up man is nothing more than a part of the internal record keeping operations of the numbers bank; the importance of his role in this regard cannot transform his receipt of records into a receipt of wagers.

In determining what Congress meant by the words "receiving wagers", one must consider the definition of the term "wager" which is set forth in Section 3285(b)(1). The term is defined as (A) any wager with respect to a sports event placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event, and (C) any wager placed in a lottery. As the definition indicates, in order for there to be a wager, there must be a "placing". It follows, therefore, as the majority of the court below observed (R. 65-66) that placing and receiving a wager are opposite sides of a single coin and that one cannot exist apart from the other. The inter-relation of the placing and receiving of a wager is recognized by the Treasury in Regulation 132, Section 325.24(a) which states:

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5. The Government suggests (Brief, p. 13) that the pick-up man "presumably" takes the money which has been wagered to the bank along with the slips which he collects from the writer. However, there is nothing in the present record to indicate that respondent, or any other pick-up man, has anything to do with the delivery of money to the bank (R. 15-16). We believe that even if a pick-up man collects both money and records from a writer he does not "receive wagers" since even then he plays no part in the placing of the wager. But in any event, a pick-up man who collects only records is clearly exempt from the tax.

> ". . . Any wager or contribution received by an agent or employee on behalf of such person [one in the business of accepting wagers or operating a wagering pool or lottery] shall be considered to have been accepted by and placed with such person."

Admittedly, the pick-up man is an agent of the banker, and he may in fact perform an essential function in the operation of the lottery as the Government argues (Brief, pp. 8, 15). But agency alone is not the key to liability for the occupational tax. The agency involved must be of a specific character, namely, one in which the agent acts for the banker in a transaction which results in the placing of a wager. Only the numbers writer falls into this category; the pick-up man is merely an agent who transmits the records of wagers received by the writer to the numbers bank.

In the *Sagonias* case, *supra* p. 11, the Fifth Circuit indicated the difficulty of fitting a pick-up man into the language of Section 3290 when it observed (223 F. 2d at 147-148):

> ". . . Its provisions clearly indicate the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. *While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation.* . . ." (Emphasis added)

The case of *Francis v. United States*, 188 U. S. 375, upon which the Government relies (Brief, pp. 13-14) comes closer to supporting our position than it does that of the Government. That case involved a statute which prohibited the interstate transportation of a paper representing an interest in a lottery. This Court held that the interstate

transportation of duplicate slips by one whose duties were similar to those of the pick-up man did not violate the statute because the duplicate slips did not represent the purchaser's interest in the lottery. Likewise, in the present case, the slips collected by the pick-up man are not the equivalent of a wager placed by the numbers player and received by the writer. Moreover, in the *Francis* case the Court observed (188 U. S. at 377):

> ". . . It would seem from the evidence, . . . that Hoff and Edgar, the carrier, were agents of the lottery company. Thus the slips were at home, as between the purchaser and the lottery, when put into Hoff's hands. They had reached their final destination in point of law, and their later movements were internal circulation within the sphere of the lottery company's possession. . . ."

This observation aptly describes the situation in the present case. The wager was "at home" when put into the writer's hands, and at that point it had reached its "final destination"; the collection of the slips by the pick-up man and their later movements "were internal circulation within the sphere of" the numbers bank.

The normal, literal meaning of the words "receiving wagers", which is of prime importance in interpreting Section 3290, can hardly be said to embrace one who, like the pick-up man, plays no part in the making of a wager.[6] To reach the contrary conclusion, one must indulge, as the Government does (Brief, pp. 7, 12) in the pretense that the wager is received by the numbers writer, is received again by the pick-up man, and is received possibly many more times by other employees of the numbers bank. As the majority of the court below observed (R. 66):

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6. It is significant that in outlining the operations of a numbers lottery, one of the police officers described the writer as "the man that took the wager" and also stated "When you [the player] make this wager he [the writer] will give you a carbon copy". (R. 15).

> ". . . But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits."

Moreover, to stretch the meaning of words in this fashion cannot be justified in the interpretation of a taxing statute the violations of which are subject to criminal sanctions.

Since the plain meaning of Section 3290 does not cover a pick-up man it must prevail. This Court has consistently refused to nullify statutes, however hard or unexpected the particular effect, when unambiguous language called for a reasonable result. *Ex parte Collett*, 337 U. S. 55, 61; *Cleveland v. United States*, 329 U. S. 14, 17-18; *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89; *Caminetti v. United States*, 242 U. S. 470. Moreover, as we will presently show, adherence to the plain meaning of the statutory language produces a result which is in accord with the Congressional purpose.

2. Exclusion of a Pick-Up Man From the Terms of Section 3290 Is in Accord With the Legislative History.

The Government contends (Brief, p. 11) that the occupational tax is applicable to "every person engaged in the occupation of gambling" and thus attempts to equate liability for the tax with guilt for the crime of gambling under state law. This position goes even further than that taken by the Treasury. See Regulation 132, Section 325.41, Example (1). The Government's argument is apparently based upon the notion that the legislative history reveals a general Congressional intent to regulate all phases of gambling through the imposition of the excise and occupational taxes.

However, the statute levying the taxes was enacted and its constitutionality sustained as a revenue raising measure, the chief feature of which is the excise tax. *United States v. Kahriger*, 345 U. S. 22. The occupational tax was conceived as a device to facilitate the collection and enforcement of the excise tax. Neither tax was aimed primarily at the regulation or suppression of gambling. For this reason, Congress confined the application of the taxes to two well defined classes—those engaged in gambling as principals and those "engaged in receiving wagers for or on behalf of" such principals. Had Congress chosen to extend the coverage of the occupational tax to include pick-up men and all others who participated in any way in gambling operations, it could have easily done so by substituting the phrase "who is an employee of any person so liable [for the excise tax]" for the phrase "who is engaged in receiving wagers for or on behalf of any person so liable" in Section 3290. Failure of Congress to do so indicates the limited scope which it intended to give to the language in that Section. Moreover, Congress was undoubtedly aware that if it attempted to make liability for the excise and occupational taxes coextensive with guilt under state criminal laws, serious doubts as to the constitutionality of the statute would arise. See *United States v. Kahriger, supra*, this page, 345 U. S. at 31, n. 10.

The intent of Congress to exclude pick-up men from liability for the occupational tax can be gleaned from the committee reports. In H. R. Rep. No. 586, 82nd Cong., 1st Sess. 1951 (1951 U. S. Code Cong. & Admin. Serv., Vol. 2, p. 1839) and Sen. Rep. 781, 82nd Cong., 1st Sess. 1951 (1951 U. S. Code Cong. & Admin. Serv., Volume 2, p. 2091), the following appears:

> ". . . A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The principals in such transactions are commonly referred to as 'bookmakers,' although it is not intended that

> any technical definition of 'bookmakers,' such as the maintenance of a handbook or other device for the recording of wagers, be required. *It is intended that a wager be considered as 'placed' with a principal when it has been placed with another person acting for him. Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as runners.'* . . .
>
> "As in the case of bookmaking transactions, *a wager will be considered as 'placed' in a pool or in a lottery whether placed directly with the person who conducts the pool or lottery or with another person acting for such a person.*" (Emphasis added.)

Thus, Congress clearly indicated that the placing and receiving of wagers were necessary concomitants. This expression of Congressional intent was incorporated into the statute by the definition of a "wager" in Section 3285(b)(1) and by the use of the phrase "receiving wagers for or on behalf of" a principal in Section 3290.

Moreover, the registration provisions of the statute which are contained in Section 3291 do not reveal any Congressional purpose to extend liability for the occupational tax to a pick-up man. Those provisions require the registration of all persons, who, like the numbers banker, are liable for the excise tax and of all persons "engaged in receiving wagers for or on behalf of" the banker. Registration was also designed to aid in the collection of the excise tax. Registration of the banker and his revelation of the numbers writers who work for him, and registration of the writer and his identification of the banker for whom he receives wagers furnish all the information necessary to keep track of a numbers lottery and the gross amount of wagers placed therein. In this connection, it should be remembered that the writer and the banker are known to one another because the writer uses a code identification symbol and because, in making payments to the winning players, the banker deals directly with the writer (R. 16).

There was no reason, therefore, for Congress to compel the registration of the pick-up man or to impose the occupational tax upon him.

The Government relies upon a statement in the Committee reports to the effect that enforcement of the excise tax "frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved." (Brief, p. 18). However, a legislative expression of such generality can be of no assistance in the interpretation of a statute. *Greenwood v. United States,* 350 U. S. 366, 374; *Federal Communications Commission v. Columbia Broadcasting System of Calif., Inc.,* 311 U. S. 132, 136. Moreover, as we have shown, registration of the banker and the writer and the payment by them of the occupational tax permits an effective tracing of the wager from the numbers player to the banker, and the pick-up man is not essential to the process.

The Government also points to statements by Representative Reed and Senator Kefauver made during the course of the Congressional debate upon the statute to support its contention that a pick-up man is liable for the occupational tax (Brief, pp. 19-20).[7] In the course of a lengthy speech analyzing the whole Revenue Act of 1951 and its impact upon governmental operations and the nation (97 Cong. Rec. 6892-6897), Representative Reed made a two-paragraph reference to the gambling taxes from which the Government has culled one sentence in which he said that the statute imposed a 10% tax on bets made with bookmakers and lottery operators, and "a $50 a year occupational tax on such professional gamblers and their agents." The single word "agents" used in a speech which made but passing mention of the statute here in question can hardly be said to be indicative of any specific Congressional intent.

7. In addition to these statements, other references to the gambling taxes may be found in 97 Cong. Rec. 6890-6892, 6902, 6904-6906, 6971-6972, 11,601, 11,644-11,645. None of them sheds any light on the problem before the Court.

In his speech, Senator Kefauver stated that under the statute "numbers operators, their agents and runners" would be required to register and pay an occupational tax of $50 a year. He also said that enforcement of the statute would involve tracing transactions "through dummy corporations, agents, subagents, and runners, . . ." His observations are no more enlightening than those of Representative Reed. Moreover, they were made in the course of a speech in opposition to the enactment of the gambling taxes (97 Cong. Rec. 12,230-12,237). Statements made in the course of legislative debate by those opposed to a statute under consideration can never be considered an authoritative guide to the interpretation of the statute. *Mastro-Plastics Corp. v. N. L. R. B.*, 350 U. S. 270, 288; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 394-395; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494.

3. The Treasury Regulation Should Be Disregarded.

Treasury Regulation 132, Section 325.41, Example (2) states:

> "B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, newsdealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.
>
> "B, his ten agents, and the employee who collects the wagers received on his behalf are each liable for the special tax."

Admittedly, the regulation purports to include a pick-up man within the scope of Section 3290. It accomplishes this by making the assumption that what he collects is "wagers". It is perhaps also significant that in the example the only ones whose functions are specifically described as "receiving wagers" on behalf of the operator of a numbers lottery" are those with whom the public places the wagers, i.e., the writers.

Although this administrative interpretation may be entitled to great weight, it does not preclude this Court from making its own interpretation of Section 3290. The Treasury may not by regulation add to the statute something which is not there. *Maass v. Higgins*, 312 U. S. 443; *Koshland v. Helvering*, 298 U. S. 441, 446-447. As we have already shown, the statutory language plainly compels the conclusion that a pick-up man like respondent who takes no part in the placing of a wager and has no contact with the player does not "receive wagers for or on behalf of" the numbers banker. As we have also demonstrated, this interpretation is supported by the legislative history of the statute. Therefore, the Treasury regulation has no valid basis.

Moreover, Example (2) in Section 325.41 is inconsistent with other parts of Regulation 132. We have already pointed out (*supra* p. 13), that in Section 325.24(a), the Treasury specifically recognizes the interrelation between the placing and receiving of a wager. In Section 325.25(a) the Treasury acknowledges that the wagering transaction has been completed when the player places his bet with the writer by providing that the excise tax attaches when "a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor." This acknowledgment is reiterated in Section 325.32(a)(1)(C)(ii) which provides that every person required to pay the excise tax shall keep records which will show "the gross amount of wagers . . . accepted for his account by agents at any place other than a registered place of business of the taxpayer . . ." That it is the writer rather than the pick-up man who "receives wagers on behalf of" the banker is also indicated in Section 325.51 which states that "every person who is engaged in receiving wagers . . . for or on behalf of another person . . . shall keep a record showing for each day . . . the amount [of money] turned over to the person on whose behalf the wagers were received, and the name and address of such person . . ."

The Treasury's inconsistency is most clearly revealed by a comparison of Example (1) with Example (2) in Section 325.41. Example (2) purports to make a pick-up man liable for the occupational tax. Example (1) states that neither a secretary nor a bookkeeper employed by a bookmaker is liable for the tax. Clearly the pick-up man's liability is based upon collections which he makes from the writers employed by the banker. Yet the bookkeeper, whose duties like those of the pick-up man are incident to the banker's internal record-keeping, and who in the pursuit of those duties would come into possession of the very things collected by the pick-up man from the writer, is not subject to the tax according to the Treasury. The justification for this distinction is not apparent.

The Government attempts to inject the Treasury's application of the occupational tax to a pick-up man into Section 3290 by reference to the adoption of the Internal Revenue Code of 1944. The Government argues that when Congress included the gambling taxes in Chapter 35 of the 1954 Code, Title 26 U. S. C., Sections 4401-4423, it reenacted verbatim the provisions of Section 3290 as Section 4411 of the new Code, thus indicating Congressional approval of the Treasury's interpretation (Brief, pp. 21-22). Although this Court has held in some instances that reenactment of a statute after an administrative interpretation thereof indicates legislative approval of the interpretation, it has done so only when that interpretation has been of long duration or when the legislative history has indicated that Congress was well aware of it and the problem with which it dealt.[8]

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8. The cases cited by the Government (Brief, p. 21), clearly illustrate this. In *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, 53, the Treasury ruling had been in effect for 20 years, had been consistently approved by the courts, and Congress had made no change in the statute despite three reenactments thereof. In *Commissioner v. Flowers*, 326 U. S. 465, the regulation in question was precisely the same as that issued under prior and succeeding revenue acts containing the same statutory language. In *Commissioner v.*

But the Court has often pointed out that reenactment of a statute following administrative interpretation or judicial decision is an unreliable indicium at best and that it is dangerous to speculate about legislative intent on the basis of mere reenactment which is accompanied by no Congressional explanation of the reasons therefor. See, e.g., *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, 431; *Commissioner v. Church's Estate*, 335 U. S. 632, 647-651; *Girouard v. United States*, 328 U. S. 61, 69-70; *Helvering v. Hallock*, 309 U. S. 106, 119-121. When Congress enacted Section 4411 of the 1954 Code, the Treasury regulation in question had been in effect for less than three years and the decision in the *Sagonias* case, *supra*, p. 11, applying it had not yet been announced. Moreover, in adopting Section 4411, Congress, as the committee reports indicate, said nothing meaningful. H. R. Rep. No. 1337, 83rd Cong., 2nd Sess. 1954, A. 325; Sen. Rep. No. 1622, 83rd Cong., 2nd Sess. 1954, 482.

CONCLUSION.

For the reasons set forth herein, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

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Wheeler, 324 U. S. 542, 546-547, Congress had enacted the substance of the regulation as a clarifying amendment of the statute. In *Helvering v. Griffiths*, 318 U. S. 371, 395-397, the statute was reenacted after a long controversy over its meaning in which the correctness of the preexisting regulation was assumed throughout. *Helvering v. Winmill*, 305 U. S. 79 involved the interpretation of the Revenue Act of 1932; the regulation, which dealt with income tax deductions, had been in existence since 1916, and Congress had not changed the statutory provision on which it was based although it had altered other parts of the statute dealing with deductions.